

No. 10686

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

ABERDEEN AERIE No. 24 OF THE FRATERNAL ORDER
OF EAGLES, a corporation,

Appellee,

and

UNITED STATES OF AMERICA,

Appellant,

vs.

BALLARD AERIE No. 172 OF THE FRATERNAL ORDER
OF EAGLES, a corporation,

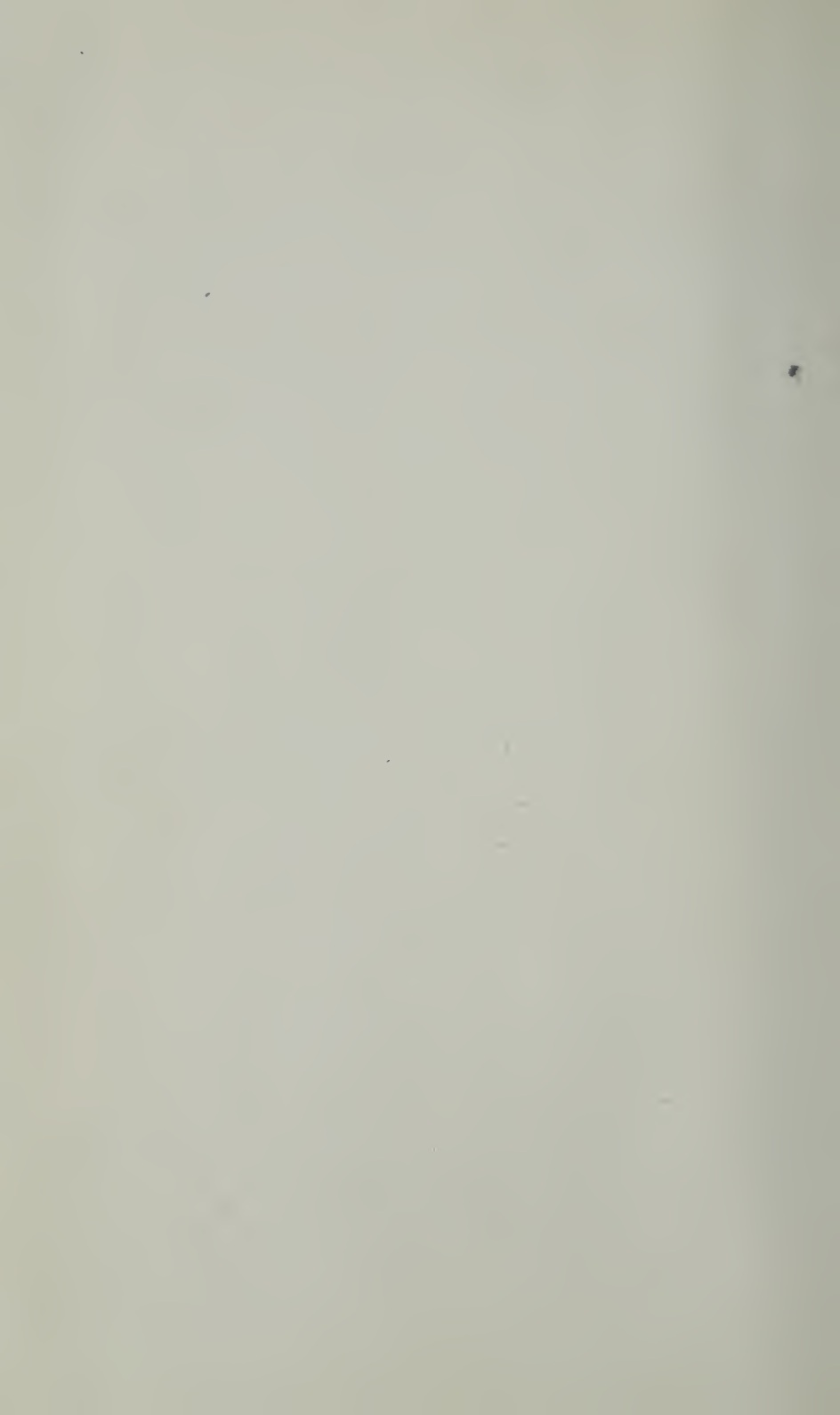
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

MAY 1 - 1944



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Western District of
Washington, Northern Division
Civil Action
File No. 608

BALLARD AERIE No. 172 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes now the plaintiff, Ballard Aerie No. 172 of the Fraternal Order of Eagles, a corporation, and for first cause of action against the defendant alleges:

I.

The ground or jurisdiction of this suit is that it is one arising under the Statute of the United States, namely: Title 28 of the U. S. C. A., Section 41, paragraph 20, providing for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected. This present action instituted by the plaintiff above named is for the recovery of internal revenue taxes erroneously and illegally assessed and collected under Title IX. of the Social Security Act of the United States and also under subchapter C entitled "Tax on Employers of Eight or More" of Title 26, Section 1600 of the United States Code

and also known as Federal Unemployment Tax Act.

II.

That the United States of America is a body politic and sovereign power.

III.

That the Plaintiff is a corporation organized and exist- [1*] ing under the laws of the State of Washington relating to Fraternal Corporations and has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington.

IV.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under the Federal Unemployment Tax Act of Title IX. of the Social Security Act of the United States for the taxable year of 1936 to 1937, and thereafter duly and regularly paid said tax in the amount of \$18.68.

V.

That on or about the 1st day of July, 1941, the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its claim for refund for taxes paid for the year 1936 to 1937, in the amount of \$18.68, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

*Page numbering appearing at foot of page of original certified Transcript of Record.

VI.

That on or about the 6th day of September, 1941, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3773 (a) (2) from the Commissioner of Internal Revenue.

VII.

That under the claim of refund filed by the plaintiff aforesaid the plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue, acting for and on behalf of the defendant, was arbitrary, capricious, wrongful and illegal, and that the defendant is now wrongfully withholding from the plaintiff without its consent and against its will the amount of \$18.68 together with lawful interest thereon. [2]

VIII.

That the plaintiff did not at any time during the calendar year of 1936 or 1937 have in its employ eight or more persons or individuals in twenty different weeks, and that no liability was incurred by the plaintiff under Title IX of the Social Security Act and the Federal Unemployment Tax Act. That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in its assessments for the aforesaid period two aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act and that said physicians were independent contractors

for the reason that the plaintiff exercised no control over them in the manner or method used by them in the performance of services rendered. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the physicians' activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such service was performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing.

IX.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as a taxable employee for the calendar year of 1936 to 1937 a musician employed by the plaintiff. That said musician was an inde- [3] pendent contractor and plaintiff exercised no control over the method or manner of the performance of the services rendered by said musician for the plaintiff, in that the services rendered by the musician consisted of playing the piano during the initiatory services held by the plaintiff and also the musician played the piano during the opening and closing ceremonies and at other times during

the regular meeting held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the period of 1936 to 1937 in any one calendar quarter receive in excess of \$45.00, and further the duties performed by the musician were strictly ritualistic in nature.

X.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, wrongfully and illegally included in his assessment for the calendar year of 1936 to 1937 as a taxable employee the Treasurer for the plaintiff. That the Treasurer at no time during the aforementioned period received in excess of \$45.00 in any calendar quarter, and therefore is not a taxable employee within the Act and does not come within the contemplation or intent of the Act, and that the Treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the regular meetings held by the plaintiff and that he attends officers meetings and serves in the capacity of a director or an advisor of the plaintiff.

Comes now the plaintiff and for a second cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under the Federal Unemploy-

ment Tax Act of Title IX. of the Social Security Act of the United States for the tax- [4] able year of 1937 to 1938, and thereafter duly and regularly paid said tax in the amount of \$98.44.

II.

That on or about the 1st day of July, 1941, the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its claim for refund for taxes paid for the year 1937 to 1938 in the amount of \$98.44, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

III.

That on or about the 6th day of September, 1941, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3773 (a) from the Commissioner of Internal Revenue, acting for and on behalf of the defendants.

IV.

That under the claim of refund filed by the plaintiff aforesaid the plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue, acting for and on behalf of the defendant, was arbitrary, capricious, wrongful and illegal, and that the defendant is now wrongfully withholding from the plaintiff without its consent and against its will the amount of \$98.44, together with lawful interest thereon.

V.

That the plaintiff did not at any time during the calendar year of 1937 to 1938 have in its employ eight or more persons or individuals in twenty different weeks, and that no liability was incurred by the plaintiff under Title IX. of the Social Security Act and the Federal Unemployment Tax Act. That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in its assessments for the aforesaid [5] period three aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act and that said persons were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the services rendered. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the physicians' activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such service was performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing.

VI.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as a taxable employee for the calendar year of 1937 to 1938 a musician employed by the plaintiff. That said musician was an independent contractor and plaintiff exercised no control over the method or manner of the performance of the services rendered by said musician consisted of playing the piano during initiatory services held by the plaintiff and also the musician played the piano during the opening and closing ceremonies and at other times during the regular meeting held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the period of 1937 to 1938 in any one calendar quarter [6] receive in excess of \$45.00, and further the duties performed by the musician were strictly ritualistic in nature.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, wrongfully and illegally included in his assessment for the calendar year of 1937 to 1938 as a taxable employee the Treasurer for the plaintiff. That the Treasurer at no time during the aforementioned period received in excess of \$45.00 in any calendar quarter, and therefore is not a taxable employee within the Act and does not come within the contemplation or intent of the Act, and

that the Treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the regular meeting held by the plaintiff and that he attends officers meetings and serves in the capacity of a director or an advisor of the plaintiff.

VIII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included the plaintiff's trustees in his assessment as taxable employees for the year 1937 to 1938, and at no time did said trustees receive in any calendar quarter compensation in excess of \$45.00, and said trustees are not taxable employees within the Act, in that they do not come within the intent or contemplation of the Act, in that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director. Further, plaintiff alleges that the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included ritualistic officers of the plaintiff as taxable employees, in that ritualistic officers do not come within the intent or the contemplation of the Act and the services performed [7] by them are ritualistic in their nature, and further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period in excess of \$45.00.

Comes now the plaintiff and for a third cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under the Federal Unemployment Tax Act of Title IX, of the Social Security Act of the United States for the taxable year of 1938 to 1939, and thereafter duly and regularly paid said tax in the amount of \$393.83. And that since said payment a credit has been allowed of \$232.92., leaving a balance of \$160.91.

II.

That on or about the 1st day of July, 1941, the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its claim for refund for taxes paid for the year 1938 to 1939, in the amount of \$393.83, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim, and there is now a balance due and owing in the sum of \$160.91.

III.

That on or about the 6th day of September, 1941, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3773 (a) (2) from the Commissioner of Internal Revenue, acting for and on behalf of the defendant.

IV.

That under the claim of refund filed by the plaintiff aforesaid the plaintiff was and is entitled to a refund of [8] the taxes paid, and the rejection by the Commissioner of Internal Revenue, acting for and on behalf of the defendant, was arbitrary, capricious, wrongful and illegal, and that the defendant is now wrongfully withholding from the plaintiff without its consent and against its will the amount of \$160.91, together with lawful interest thereon.

V.

That the plaintiff did not at any time during the calendar year of 1938 to 1939 have in its employ eight or more persons or individuals in twenty different weeks, and that no liability was incurred by the plaintiff under Title IX. of the Social Security Act and the Federal Unemployment Tax Act. That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in its assessments for the aforesaid period two aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act and that said persons were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the services rendered. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered

for the plaintiff upon the premises of the plaintiff, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the physicians' activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such service was performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing. [9]

VI.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as a taxable employee for the calendar year of 1938 to 1939 a musician employed by the plaintiff. That said musician was an independent contractor and plaintiff exercised no control over the method or manner of the performance or the services rendered by said musician for the plaintiff, in that the services rendered by the musician consisted of playing the piano during initiatory services held by the plaintiff and also the musician played the piano during the opening and closing ceremonies and at other times during the regular meeting held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the period of 1938 to 1939 in any one calendar quarter receive in excess of \$45.00, and further the duties performed by the musician were strictly ritualistic in nature.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, wrongfully and illegally included in his assessment for the calendar year of 1938 to 1939 as a taxable employee the Treasurer for the plaintiff. That the Treasurer at no time during the aforementioned period received in excess of \$45.00 in any calendar quarter, and therefore is not a taxable employee within the Act and does not come within the contemplation or intent of the Act, and that the Treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the regular meetings held by the plaintiff and that he attends officers meetings and serves in the capacity of a director or an advisor of the [10] plaintiff.

VIII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included the plaintiff's trustees in his assessment as taxable employees for the year 1938 to 1939, and at no time did said trustees receive in any calendar quarter compensation in excess of \$45.00, and said trustees are not taxable employees within the Act, in that they do not come within the intent or contemplation of the Act, in that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director. Further plaintiff alleges that the Collector of Internal

Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included ritualistic officers of the plaintiff as taxable employees, in that ritualistic officers do not come within the intent or the contemplation of the Act and the services performed by them are ritualistic in their nature, and further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period in excess of \$45.00.

Comes now the plaintiff and for a fourth cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under the Federal Unemployment Tax Act of Title IX. of the Social Security Act of the United States for the taxable year of 1939 to 1940, and thereafter duly and regularly paid said tax in the amount of \$310.79. That since said payment a credit has been allowed in the amount of \$157.70, leaving [11] a balance of \$153.08.

II.

That on or about the 1st day of July, 1941, the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its claim for refund for taxes paid for the year 1939 to 1940, in the amount of \$310.79, and set forth in said claim for refund the grounds upon

which the plaintiff founded its claim, and there is now a balance due and owing in the sum of \$153.08.

III.

That on or about the 6th day of September, 1941, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3773 (a) (2) from the Commissioner of Internal Revenue.

IV.

That under the claim of refund filed by the plaintiff aforesaid the plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue, acting for and on behalf of the defendant, was arbitrary, capricious, wrongful and illegal, and that the defendant is now wrongfully withholding from the plaintiff without its consent and against its will the amount of \$153.08, together with lawful interest thereon.

V.

That the plaintiff did not at any time during the calendar year of 1939 to 1940 have in its employ eight or more persons or individuals in twenty different weeks, and that no liability was incurred by the plaintiff under Title IX. of the Social Security Act and the Federal Unemployment Tax Act. That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in its assessments for the aforesaid period two aerie

physicians as taxable employees, and the [12] plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act and that said persons were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the services rendered. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the physicians' activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such service was performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing.

VI.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as a taxable employee for the calendar year of 1939 to 1940, a musician employed by the plaintiff. That said musician was an independent contractor and plaintiff exercised no control over the method or manner of the performance of the services rendered by the musician for the plaintiff, in that the services rendered by the musician

consisted of playing the piano during initiatory services held by the plaintiff and also the musician played the piano during the opening and closing ceremonies and at other times during the regular meeting held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the period of 1939 to 1940 in any one calendar quarter receive in excess of \$45.00, and further the duties [13] performed by the musician were strictly ritualistic in nature.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, wrongfully and illegally included in his assessment for the calendar year of 1939 to 1940 as a taxable employee the Treasurer for the plaintiff. That the Treasurer at no time during the aforementioned period received in excess of \$45.00 in any calendar quarter, and therefore is not a taxable employee within the Act and does not come within the contemplation or intent of the act, and that the Treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the regular meeting held by the plaintiff and that he attends officers meetings and serves in the capacity of a director or an advisor of the plaintiff.

VIII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included the

plaintiff's trustees in his assessment as taxable employees for the year 1939 to 1940, and at no time did said trustees receive in any calendar quarter compensation in excess of \$45.00, and said trustees are not taxable employees within the Act, in that they do not come within the intent or contemplation of the Act, in that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director. Further, plaintiff alleges that the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included ritualistic officers of the plaintiff as taxable employees, in that ritualistic officers do not come within the intent [14] or the contemplation of the Act and the services performed by them are ritualistic in their nature, and further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period in excess of \$45.00.

IX.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment for taxable employees within the year 1939 to 1940 the plaintiff's President and Vice President, whose duties are ritualistic in nature, and the compensation received by said President and Vice President at no time was in excess of \$45.00 for any calendar quarter during the afore-

mentioned period, and that said *periods* are not taxable employees within the contemplation and intent of the Act.

Wherefore, plaintiff prays for judgment against the United States of America as follows:

On the first cause of action the sum of \$18.68, together with lawful interest thereon.

On the second cause of action the sum of \$98.44, together with lawful interest thereon.

On the third cause of action the sum of \$160.91, together with lawful interest thereon.

On the fourth cause of action the sum of \$153.08, together with lawful interest thereon.

And for such other and further relief as to the court may seem equitable in the premises.

CORNELIUS C. CHAVELLE

Attorney for Plaintiff. [15]

State of Washington,
County of King—ss.

Cornelius C. Chavelle, being first duly sworn, on oath deposes and says: That he is the attorney for the plaintiff herein and has been duly authorized to represent the plaintiff, and he makes this verification for and on behalf of the plaintiff, having been authorized to do so; that he knows the contents thereof, and believes the same to be true.

CORNELIUS C. CHAVELLE.

Subscribed and sworn to before me this 29th day of October, 1942.

EDWARD H. CHAVELLE,

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Nov. 4, 1942. [16]

United States District Court, Western District of
Washington, Southern Division

File No. 459—Civil Action

ABERDEEN AERIE No. 24 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes now the plaintiff, Aberdeen Aerie No. 24 of the Fraternal Order of Eagles, a corporation, and for first cause of action against the defendants alleges:

I.

The ground of jurisdiction of this suit is that it is one arising under the Statute of the United States, namely: Title 28 of the U. S. C. A., Section 41, paragraph 20, providing for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected. This present

action instituted by the plaintiff above named is for the recovery of internal revenue taxes erroneously and illegally assessed and collected under Title VIII. of the Social Security Act of the United States and subchapter A of Chapter IX. of the Internal Revenue Code (Federal Insurance Contributions Act, as amended by Social Security Act Amendments of 1939).

II.

That the United States of America is a body politic and sovereign power.

III.

That the plaintiff is a corporation organized and existing under the laws of the State of Washington relating to Fraternal [17] corporations and has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington, and maintains its club premises at Aberdeen, Washington.

IV.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, acting for and on behalf of the defendant, its returns under Title VIII. of the Social Security Act and the Federal Insurance Contributions Act for the calendar year of 1938 to 1939, and thereafter duly and regularly paid said tax in the amount of \$19.24.

V.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue, acting for and

on behalf of the defendant, its claim for refund for taxes paid for the period of 1938 to 1939 under claim No. 432963 in the amount of \$19.24, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

VI.

That on or about the 1st day of October, 1942, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with provisions of Section 3772 (a) (2) of the Internal Revenue Code from the Commissioner of Internal Revenue of the United States of America.

VII.

That under the claim of refund filed by the plaintiff aforesaid plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue was arbitrary, capricious, wrongful and illegal, and that the Collector of Internal Revenue, acting for and on behalf of the defendant, is now wrongfully withholding from the plaintiff without its consent and against its will the amount of \$19.24, together with lawful interest thereon. [18]

VIII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessments for the aforesaid period, namely: the calendar year of 1938 to 1939 two aerie physicians as taxable employees, and the plaintiff affirmatively

alleges that said physicians were not and are not taxable employees within the Act, and that said aerie physicians were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the performance of the services rendered by them. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and said services were not rendered in the usual course or conduct of the business of the plaintiff, as the plaintiff was in an entirely different business, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such services were performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing.

IX.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included plaintiff's trustees in his assessment as taxable employees for the year 1938 to 1939, and that said trustees are not taxable employees within the Act, in that they do not come within the intent and contemplation of the Act, and further that their duties

are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are [19] in the nature of that of a director of a corporation. And further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period compensation in excess of \$45.00.

X.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as taxable employees for the year 1938 to 1939 certain ritualistic officers, such as the musician, the treasurer, the president and vice president and certain committee members of the plaintiff, and plaintiff alleges that said musician was an independent contractor, and the plaintiff exercised no control over the method or manner of the performance of the services rendered by said musician, in that the services rendered by the musician were of a ritualistic nature, in that they consisted of playing the piano during initiatory services held by the plaintiff and also the playing of the piano during the opening and closing ceremonies, and at other times during the regular meetings held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the calendar year of 1938 to 1939 receive in excess of \$45.00 during any one calendar quarter, and further the duties performed by the musician were of a strictly ritu-

alistic nature. That the treasurer, who was included in the Collector of Internal Revenue's assessment is not a taxable employee, and at no time during the aforementioned period did the treasurer receive in excess of \$45.00 during any calendar quarter, and therefore is not a taxable employee within the act and does not come within the contemplation or the intent of the Act, and that the treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the meetings held by the plaintiff, and that he attends officers meetings and serves in the capacity of a [20] director or an advisor of the plaintiff. And that the other ritualistic officers included by the Collector of Internal Revenue for the aforementioned period were not taxable employees within the Act and do not come within the contemplation or intent of the Act, in that their duties are strictly ritualistic in nature and none of them receive in excess of \$45.00 during any calendar quarter during the aforementioned period.

Comes now the plaintiff and for a second cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under Title VIII. of the Social Security Act and the Federal Insurance Contributions Act for the calendar year of 1939 to 1940, and thereafter duly and regularly paid said tax in the amount of \$22.81.

II.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue, acting for and on behalf of the defendant, its claim for refund for taxes paid for the period of 1939 to 1940 under claim No. 432973 in the amount of \$22.81, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

III.

That on or about the 1st day of October, 1942, Notices of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3772 (a) (2) of the Internal Revenue Code from the Commissioner of Internal Revenue of the United States of America.

IV.

That under the claim of refund filed by the plaintiff aforesaid plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue was [21] arbitrary, capricious, wrongful and illegal, and that the defendant United States of America is now wrongfully withholding from the plaintiff without its consent and against its will the amount of \$22.81, together with lawful interest thereon.

V.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his

assessments for the aforesaid period, namely, the calendar year of 1939 to 1940, two aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act, and that said aerie physicians were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the performance of the services rendered by them. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and said services were not rendered in the usual course or conduct of the business of the plaintiff, as the plaintiff was in an entirely different business, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such services were performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing.

VI.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included plaintiff's trustees in his assessment as taxable employees for the year 1939 to 1940, and that said

trustees are [22] not taxable employees within the Act, in that they do not come within the intent and contemplation of the Act, and further that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director of a corporation. And further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period compensation in excess of \$45.00.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the United States of America, arbitrarily, erroneously, illegally and wrongfully included in his assessment as taxable employees for the year 1939 to 1940 certain ritualistic officers, such as the musician, the treasurer, the president and vice president and certain committee members of the plaintiff, and plaintiff alleges that said musician was an independent contract, and the plaintiff exercised no control over the method or manner of the performance of the services rendered by the musician and they were of a ritualistic nature, in that they consisted of playing the piano during initiatory services held by the plaintiff and also the playing of the piano during the opening and closing ceremonies, and at other times during the regular meetings held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the calendar year of 1939 to 1940 receive in excess of \$45.00

during any one calendar quarter, and further the duties performed by the musician were of a strictly ritualistic nature. That the treasurer, who was included in the Collector of Internal Revenue's assessment is not a taxable employee, and at no time during the aforementioned period did the treasurer receive in excess of \$45.00 during any calendar quarter, and therefore is not a taxable employee within the Act and does not come within the contemplation or the intent of the Act, and that the treasurer's duties are rit- [23] ualistic in nature, in that he performed certain ritualistic duties during the meetings held by the plaintiff, and that he attends officers meetings and serves in the capacity of a director or an advisor of the plaintiff. And that the other ritualistic officers included by the Collector of Internal Revenue for the aforementioned period were not taxable employees within the Act and do not come within the contemplation or intent of the Act, in that their duties are strictly ritualistic in nature and none of them receive in excess of \$45.00 during any calendar quarter during the aforementioned period.

Comes now the plaintiff and for a third cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under Title VIII. of the Social Security Act and the Federal Insurance Contribu-

tions Act for the calendar year of 1940 to 1941, and thereafter duly and regularly paid said tax in the amount of \$19.20.

II.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue, acting for and on behalf of the defendant, its claim for refund for taxes paid for the period of 1940 to 1941 under claim No. 432965 in the amount of \$19.20, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

III.

That on or about the 1st day of October, 1942, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with the provisions of Section 3773 (a) (2) of the Internal Revenue Code from the Commissioner of Internal Revenue of the United States of America. [24]

IV.

That under the claim of refund filed by the plaintiff aforesaid plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the Commissioner of Internal Revenue was arbitrary, capricious, wrongful and illegal, and that the defendant United States of America is now wrongfully withholding from the plaintiff without its consent and against its will the amount of \$19.20, together with lawful interest thereon.

V.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessments for the aforesaid period, namely: the calendar year of 1940 to 1941, two aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act, and that said aerie physicians were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the performance of the services rendered by them. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and said services were not rendered in the usual course or conduct of the business of the plaintiff, as the plaintiff was in an entirely different business, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of the business for which such services were performed, and the physicians were free to administer their treatment and otherwise perform their duties in a manner of their own choosing.

VI.

That the Collector of Internal Revenue, acting for and on [25] behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included plaintiff's trustees in his assessment as taxable employees for the year 1940 to 1941, and that said trustees are not taxable employees within the Act, in that they do not come within the intent and contemplation of the Act, and further that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director of a corporation. And further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period compensation in excess of \$45.00.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as taxable employees for the year 1940 to 1941 certain ritualistic officers, such as the musician, the treasurer, the president and vice president and certain committee members of the plaintiff, and plaintiff alleges that said musician was an independent contractor, and the plaintiff exercised no control over the method or manner of the performance of the services rendered by the musician were of a ritualistic nature, in that they consisted of playing the piano during initiatory services held by the plaintiff and also the playing of the piano

during the opening and closing ceremonies, and at other times during the regular meetings held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the calendar year of 1940 to 1941 receive in excess of \$45.00 during any one calendar quarter, and further the duties performed by the musician were of a strictly ritualistic nature. That the treasurer, who was included in the Collector of Internal Revenue's assessment is not a taxable employee, and at no time during the aforementioned period did the treasurer receive in excess of \$45.00 during any calendar quarter, [26] and therefore is not a taxable employee within the Act and does not come within the contemplation or the intent of the Act, and that the treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the meetings held by the plaintiff, and that he attends officers meetings and serves in the capacity of a director or an advisor of the plaintiff. And that the other ritualistic officers included by the Collector of Internal Revenue for the aforementioned period were not taxable employees within the Act and do not come within the contemplation or intent of the Act, in that their duties are strictly ritualistic in nature and none of them received in excess of \$45.00 during any calendar quarter during the aforementioned period.

Comes now the plaintiff and for a fourth cause of action against the defendant alleges:

I.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue at Tacoma, Washington, its returns under Title VIII. of the Social Security Act and the Federal Insurance Contributions Act for the period from January 1, 1941 through September 30, 1941, and thereafter duly and regularly paid said tax in the amount of \$18.86.

II.

That the plaintiff duly and regularly filed with the Collector of Internal Revenue, acting for and on behalf of the defendant, its claim for refund for taxes paid for the period of January 1, 1941, through September 30, 1941 under claim No. 432964 in the amount of \$18.86, and set forth in said claim for refund the grounds upon which the plaintiff founded its claim.

III.

That on or about the 1st day of October, 1942, Notice of Disallowance of said claim for refund was received by the plaintiff in accordance with provisions of Section 3773 (a) (2) of the Internal Revenue Code from the Commissioner of Internal Revenue of the United States of America.

IV.

That under the claim of refund filed by the plaintiff aforesaid plaintiff was and is entitled to a refund of the taxes paid, and the rejection by the

Commissioner of Internal Revenue was arbitrary, capricious, wrongful and illegal, and that the defendant United States of America is now wrongfully withholding from the plaintiff without its consent and against its will the amount of \$18.86, together with lawful interest thereon.

V.

That the Collector of Internal Revenue acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessments for the aforesaid period, namely: the period from January 1, 1941 through September 30, 1941, two aerie physicians as taxable employees, and the plaintiff affirmatively alleges that said physicians were not and are not taxable employees within the Act, and that said aerie physicians were independent contractors for the reason that the plaintiff exercised no control over them in the manner or method used by them in the performance of the services rendered by them. That said aerie physicians were at all times herein mentioned engaged in an independently established profession and at no time performed any of their services rendered for the plaintiff upon the premises of the plaintiff, and said services were not rendered in the usual course or conduct of the business of the plaintiff, as the plaintiff was in an entirely different business, and further the plaintiff made no attempt to prescribe the method of treatment or to direct or control the activities relative to the services rendered, and such services rendered by the physicians were outside the usual course of

the business for which such services were performed, and the physicians were free to administer their treatment and other- [28] wise perform their duties in a manner of their own choosing.

VI.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included plaintiff's trustees in his assessment as taxable employees for the period from January 1, 1941 through September 30, 1941, and that said trustees are not taxable employees within the Act, in that they do not come within the intent and contemplation of the Act, and further that their duties are of a ritualistic nature and they serve in an advisory capacity and the services performed by said trustees are in the nature of that of a director of a corporation. And further plaintiff alleges that at no time did said trustees receive in any calendar quarter during the aforementioned period compensation in excess of \$45.00.

VII.

That the Collector of Internal Revenue, acting for and on behalf of the defendant, arbitrarily, erroneously, illegally and wrongfully included in his assessment as taxable employees for the period from January 1, 1941 through September 30, 1941, certain ritualistic officers, such as the musician, the treasurer, the president and vice president and certain committee members of the plaintiff, and plaintiff alleges that said musician was an independent con-

tractor, and the plaintiff exercised no control over the method or manner of the performance of the services rendered by the musician were of a ritualistic nature, in that they consisted of playing the piano during initatory services held by the plaintiff and also the playing of the piano during the opening and closing ceremonies, and at other times during the regular meetings held by the plaintiff, and the selections played were a matter of the musician's own choice, and further the musician did not during the period from January 1, 1941 through September 30, 1941, receive in excess of \$45.00 during any one calendar quar- [29] ter, and further the duties performed by the musician were of a strictly ritualistic nature. That the treasurer, who was included in the Collector of Internal Revenue's assessment is not a taxable employee, and at no time during the aforementioned period did the treasurer receive in excess of \$45.00 during any calendar quarter, and therefore is not a taxable employee within the act and does not come within the contemplation or intent of the Act, and that the treasurer's duties are ritualistic in nature, in that he performed certain ritualistic duties during the meetings held by the plaintiff, and that he attends officers' meetings and serves in the capacity of a director or an advisor of the plaintiff. And that the other ritualistic officers included by the Collector of Internal Revenue for the aforementioned period were not taxable employees within the Act and do not come within the contemplation or intent

of the Act, in that their duties are strictly ritualistic in nature and none of them receive in excess of \$45.00 during any calendar quarter during the aforementioned period.

Wherefore, plaintiff prays for judgment against the United States of America as follows:

On the first cause of action the sum of \$19.24, together with lawful interest thereon.

On the second cause of action the sum of \$22.81, together with lawful interest thereon.

On the third cause of action the sum of \$19.20, together with lawful interest thereon.

On the fourth cause of action the sum of \$18.86, together with lawful interest thereon. And for such other and further relief as to the court may seem equitable in the premises.

CORNELIUS C. CHAVELLE,
Attorney for Plaintiff. [30]

State of Washington
County of King—ss.

Cornelius C. Chavelle, being first duly sworn, on oath deposes and says: That he is the attorney for said plaintiff, and that he makes this verification for and on behalf of said plaintiff, having been authorized to do so, and that he knows the contents thereof, and believes the same to be true.

CORNELIUS C. CHAVELLE

Subscribed and Sworn to before me this 5th day
of November, 1942.

EDWARD H. CHAVELLE

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Nov. 5, 1942. [31]

In the District Court of the United States for
the Western District of Washington, Southern
Division

Civil Action

No. 459

ABERDEEN AERIE No. 24 OF THE FRA-
TERNAL ORDER OF EAGLES, a corpora-
tion,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

ANSWER

Now comes the Defendant, the United States of
America, by its attorney, J. Charles Dennis, United
States Attorney for the Western District of Wash-
ington, and in answer to plaintiff's complaint
states:

ANSWER TO FIRST CLAIM

1.

The allegations contained in paragraph I of the first claim of plaintiff's complaint are admitted, except the allegations that the tax there referred to was erroneously or illegally assessed or collected, or erroneously and illegally assessed and collected, which allegations are denied.

2.

The allegations contained in paragraph II of the first claim of plaintiff's complaint are admitted.

3.

The allegations contained in paragraph III of the first claim of plaintiff's complaint are admitted, except the allegation that plaintiff has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington, which allegation, for lack of sufficient information on which to form a belief, is denied. [32]

4.

The allegations contained in paragraph IV of the first claim of plaintiff's complaint are denied. Defendant avers that plaintiff filed both original and supplementary quarterly returns for 1938, under Title VIII of the Social Security Act; that said returns indicated an amount due of \$53.08, consisting of principal of tax and interest; that said amount was paid by plaintiff.

5.

The allegations contained in paragraph V of the first claim of plaintiff's complaint are denied. Defendant avers that on January 23, 1942, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a claim for refund of tax illegally collected under Title VIII of the Social Security Act in the amount of \$19.24 with respect to 1938; that said purported claim for refund set forth the grounds on which it was filed.

6.

The allegations contained in paragraph VI of the first claim of plaintiff's complaint are admitted, except the allegation referring to section 3773 (a) (2), which allegation, since said section has no pertinence to the matter at hand, is denied.

7.

The allegations contained in paragraph VII of the first claim of plaintiff's complaint are denied.

8.

The allegations contained in paragraph VIII of the first claim of plaintiff's complaint are denied. Defendant avers that one Aerie physician was included as a taxable employee in the assessments there referred to.

9.

The allegations contained in paragraph IX of the first claim of [33] plaintiff's complaint are denied, except the allegation that the trustees there referred to were included as taxable employees, which allegation is admitted.

10.

The allegations contained in paragraph X of the first claim of plaintiff's complaint are denied, except the allegation that the treasurer, the president, the vice president, and certain committee members, namely, members of the audit committee, there referred to were included as taxable employees, which allegation is admitted. Without limitation by specification, defendant specifically denies that the musician there referred to was included as a taxable employee.

11.

Further answering the first claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO FIRST CLAIM

12.

As an affirmative defense to the first claim of plaintiff's complaint, in the event the musician referred to in paragraph X of the first claim of plaintiff's complaint was included as a taxable employee for 1938, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to this musician since this individual does not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph V of the first claim of plaintiff's complaint.

ANSWER TO SECOND CLAIM

13.

The allegations contained in paragraph I of the second claim of plaintiff's complaint are denied. Defendant avers that plaintiff filed both original and supplementary quarterly returns for 1939 under Title [34] VIII of the Social Security Act; that said returns indicated an amount due of \$59.12 consisting of principal of tax and interest; that said amount was paid by plaintiff.

14.

The allegations contained in paragraph II of the second claim of plaintiff's complaint are denied. Defendant avers that on January 23, 1942, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a claim for refund of tax illegally collected under Title VIII of the Social Security Act in the amount of \$22.81 with respect to 1939; that said purported claim for refund set forth the grounds on which it was filed.

15.

The allegations contained in paragraph III of the second claim of plaintiff's complaint are admitted, except the allegation referring to section 3773 (a) (2), which allegation, since said section has no pertinence to the matter at hand, is denied.

16.

The allegations contained in paragraph IV of the second claim of plaintiff's complaint are denied.

17.

The allegations contained in paragraph V of the second claim of plaintiff's complaint are denied. Defendant avers that one Aerie physician was included as a taxable employee in the assessments there referred to.

18.

The allegations contained in paragraph VI of the second claim of plaintiff's complaint are denied, except the allegation that the trustees there referred to were included as taxable employees, which allegation is admitted. [35]

19.

The allegations contained in paragraph VII of the second claim of plaintiff's complaint are denied, except the allegation that the treasurer, the president, and certain committee members, namely, members of the audit committee, there referred to were included as taxable employees, which allegation is admitted. Without limitation by specification, defendant specifically denies that the musician and the vice president there referred to were included as taxable employees.

20.

Further answering the second claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO SECOND
CLAIM

21.

As an affirmative defense to the second claim of

plaintiff's complaint, in the event the musician and the vice president referred to in paragraph VII of the second claim of plaintiff's complaint were included as taxable employees for 1939, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to this musician and this vice president since they do not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph II of the second claim of plaintiff's complaint.

ANSWER TO THIRD CLAIM

22.

The allegations contained in paragraph I of the third claim of plaintiff's complaint are denied. Defendant avers that plaintiff filed both original and supplementary quarterly returns for 1940 under the Federal Insurance Contributions Act; that said returns indicated an amount due of \$57.84, consisting of principal of tax and interest; that said amount was paid by plaintiff. [36]

23.

The allegations contained in paragraph II of the third claim of plaintiff's complaint are denied. Defendant avers that on January 23, 1942, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843, what purported to be a claim for refund of tax illegally collected under Title VIII of the Social Security Act in the amount of \$19.20 with respect to 1940; that said purported claim for refund set forth the ground on which it was filed.

24.

The allegations contained in paragraph III of the third claim of plaintiff's complaint are admitted, except the allegation referring to section 3773 (a) (2) which allegation, since said section has no pertinence to the matter at hand, is denied.

25.

The allegations contained in paragraph IV of the third claim of plaintiff's complaint are denied.

26.

The allegations contained in paragraph V of the third claim of plaintiff's complaint are denied. Defendant avers that one Aerie physician was included as a taxable employee in the assessments there referred to.

27.

The allegations contained in paragraph VI of the third claim of plaintiff's complaint are denied. Without limitation by specification, defendant specifically denies that the trustees there referred to were included as taxable employees.

28.

The allegations contained in paragraph VII of the third claim of plaintiff's complaint are denied. Without limitation by specification, defendant specifically denies that any alleged ritualistic officers such [37] as the musician, the treasurer, the president and vice president, and certain committee members there referred to were included as taxable employees.

29.

Further answering the third claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO THIRD CLAIM

30.

As an affirmative defense to the third claim of plaintiff's complaint, in the event the trustees, referred to in paragraph VI of the third claim of plaintiff's complaint and the certain alleged ritualistic officers, such as the musician, the treasurer, the president and vice president and certain committee members referred to in paragraph VII of the third claim of plaintiff's complaint were included as taxable employees for 1940, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to these, since they do not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph II of the third claim of plaintiff's complaint.

ANSWER TO FOURTH CLAIM

31.

The allegations contained in paragraph I of the fourth claim of plaintiff's complaint are denied. Defendant avers that plaintiff filed quarterly returns for the period January 1, 1941 through September 30, 1941, under the Federal Insurance Contributions Act; that said returns indicated an amount

due of \$47.51, principal of tax; that said amount was paid by plaintiff.

32.

The allegations contained in paragraph II of the fourth claim of [38] plaintiff's complaint are denied. Defendant avers that on January 23, 1942, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a claim for refund of tax illegally collected under Title VIII of the Social Security Act in the amount of \$8.86 with respect to the period January 1, 1941 through September 30, 1941; that said purported claim for refund set forth the ground on which it was filed.

33.

The allegations contained in paragraph III of the fourth claim of plaintiff's complaint are admitted, except the allegation referring to section 3773 (a) (2), which allegation, since said section has no pertinence to the matter at hand, is denied.

34.

The allegations contained in paragraph IV of the fourth claim of plaintiff's complaint are denied.

35.

The allegations contained in paragraph V of the fourth claim of plaintiff's complaint are denied. Defendant avers that one Aerie physician was included as a taxable employee in the assessments there referred to.

36.

The allegations contained in paragraph VI of the fourth claim of plaintiff's complaint are denied. Without limitation by specification, defendant specifically denies that the trustees there referred to were included as taxable employees.

37.

The allegations contained in paragraph VII of the fourth claim of plaintiff's complaint are denied. Without limitation by specification, defendant specifically denies that any alleged ritualistic officers such [39] as the musician, the treasurer, the president and vice president, and certain committee members there referred to were included as taxable employees.

38.

Further answering the fourth claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSES TO FOURTH CLAIM

39.

As an affirmative defense to the fourth claim of plaintiff's complaint, in the event the trustees referred to in paragraph VI of the fourth claim of plaintiff's complaint and the certain alleged ritualistic officers, such as the musician, the treasurer, the president and vice president, and certain committee members referred to in paragraph VII of the fourth claim of plaintiff's complaint were included

as taxable employees for the period January 1, 1941 through September 30, 1941, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to these since they do not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph II of the fourth claim of plaintiff's complaint.

40.

As a further affirmative defense to the fourth claim of plaintiff's complaint, in the event plaintiff is entitled to recover any amount under this claim, defendant alleges that this Court has no jurisdiction to grant plaintiff any amount in excess of \$8.86, principal of tax, since this constitutes the extent of the relief claimed in what purported to be the claim for refund referred to in paragraph II of the fourth claim of plaintiff's complaint. [40]

Wherefore defendant prays judgment that the complaint of the plaintiff be dismissed with costs to the defendant.

J. CHARLES DENNIS

United States Attorney

HARRY SAGER

Asst. United States Attorney

THOS. R. WINTER

Special Rep. to the General
Counsel

[Endorsed]: Filed Feb. 3, 1943. [41]

In the District Court of the United States for
the Western District of Washington, Northern
Division

Civil Action

No. 608

BALLARD AERIE No. 172 OF THE FRA-
TERNAL ORDER OF EAGLES, a corpora-
tion,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

AMENDED ANSWER

Now comes the defendant, United States of America, by its attorney, J. Charles Dennis, United States Attorney for the Western District of Washington, and in answer to plaintiff's complaint states:

ANSWER TO FIRST CLAIM

1.

The allegations contained in paragraph I of the first claim of plaintiff's complaint are admitted, except the allegations that the tax there referred to was erroneously or illegally assessed or collected, or erroneously and illegally assessed and collected, which allegations are denied.

II.

The allegations contained in paragraph II of the first claim of plaintiff's complaint are admitted.

3.

The allegations contained in paragraph III of the first claim of plaintiff's complaint are admitted, except the allegation that plaintiff has paid all license fees now due and owing by it to operate a fraternal corporation in the state of Washington which allegation, for lack of sufficient information on which to form a belief, is denied. [42]

4.

The allegations contained in paragraph IV of the first claim of plaintiff's complaint are denied. Defendant avers that on January 17, 1941, plaintiff filed its annual return for 1936 under Title IX of the Social Security Act; that said return indicated an amount due of \$18.68, consisting of principal of tax penalty and interest; that said amount was paid by plaintiff.

5.

The allegations contained in paragraph V of the first claim of plaintiff's complaint are denied. Defendant avers that on July 16, 1941, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a claim for refund of Federal Unemployment Compensation Taxes in the amount of \$18.68 illegally collected with respect to 1936; that said purported claim for refund set forth the grounds on which it was filed.

6.

The allegations contained in paragraph VI of the first claim of plaintiff's complaint are admitted; except the allegation referring to Section 3773 (a)

(2) which allegation, since said section has no pertinence to the matter at hand, is denied.

7.

The allegations contained in paragraph VII of the first claim of plaintiff's complaint are denied.

8.

The allegations contained in paragraph VIII of the first claim of plaintiff's complaint are denied, except the allegations that the two Aerie physicians referred to were included as taxable employees which allegation is admitted. [43]

9.

The allegations contained in paragraph IX of the first claim of plaintiff's complaint are denied, except the allegation that the musician there referred to was included as a taxable employee which allegation is admitted.

10.

The allegations contained in paragraph X of the first claim of plaintiff's complaint are denied, except the allegation that the treasurer there referred to was included as a taxable employee which allegation is admitted.

11.

Further answering the first claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

ANSWER TO SECOND CLAIM

12.

The allegations contained in paragraph I of the second claim of plaintiff's complaint are denied. Defendant avers that on January 17, 1941, plaintiff filed its annual return for 1937 under Title IX of the Social Security Act; that said return indicated an amount due of \$98.44, consisting of principal of tax, penalty and interest; that said amount was paid by plaintiff.

13.

The allegations contained in paragraph II of the second claim of plaintiff's complaint are denied. Defendant avers that on July 16, 1941, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a claim for refund of Federal Unemployment Compensation Taxes in the amount of \$98.44 illegally collected with respect to 1937; that said purported claim for refund set forth the grounds on which it was filed. [44]

14.

The allegations contained in paragraph III of the second claim of plaintiff's complaint are admitted, with the following exceptions: The allegation that the claim for refund there referred to was disallowed on September 6, 1941, is denied; the allegations referring to Section 3773 (a) (2), since said section has no pertinence to the matter at hand, is denied. Defendant avers that the claim for refund there referred to was disallowed on March 25, 1942.

15.

The allegations contained in paragraph IV of the second claim of plaintiff's complaint are denied.

16.

The allegations contained in paragraph V of the second claim of plaintiff's complaint are denied, except the allegation that the three Aerie physicians there referred to were included as taxable employees, which allegation is admitted.

17.

The allegations contained paragraph VI of the second claim of plaintiff's complaint are denied, except the allegation that the musician there referred to was included as a taxable employee, which allegation is admitted.

18.

The allegations contained in paragraph VII of the second claim of plaintiff's complaint are denied, except the allegation that the treasurer there referred to was included as a taxable employee, which allegation is admitted.

19.

The allegations contained in paragraph VIII of the second claim of plaintiff's complaint are denied, except the allegation that the trustees there referred to were included as [45] taxable employees, which allegation is admitted. Defendant avers that the trustees so included as taxable employees were three in number.

20.

Further answering the second claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO FIRST CLAIM

21.

As an affirmative defense to the second claim of plaintiff's complaint, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to the treasurer, referred to in paragraph VII of the second claim of plaintiff's complaint, since this individual does not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph II of the second claim of plaintiff's complaint.

ANSWER TO THIRD CLAIM

22.

The allegations contained in paragraph I of the third claim of plaintiff's complaint are denied, except the allegation that a credit has been allowed in the amount of \$232.92, which allegation is admitted. The defendant avers that on January 17, 1941, plaintiff filed its annual return for 1938 under Title IX of the Social Security Act; that said return indicated an amount due of \$393.82, consisting of principal of tax, penalty and interest; that said amount was paid by plaintiff.

23.

The allegations contained in paragraph II of the third claim of plaintiff's complaint are denied. Defendant avers that on July 16, 1941, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a [46] claim for refund of Federal Unemployment Compensation Taxes in the amount of \$393.82 illegally collected with respect to 1938; that said purported claim for refund set forth the grounds on which it was filed.

24.

The allegations contained in paragraph III of the third claim of plaintiff's complaint are admitted, except the allegation referring to Section 3773 (a) (2) which allegation, since said section has no pertinence to the matter at hand, is denied.

25.

The allegations contained in paragraph IV of the third claim of plaintiff's complaint are denied.

26.

The allegations contained in paragraph V of the third claim of plaintiff's complaint are denied, except the allegation that the two Aerie physicians referred to were included as taxable employees, which allegation is admitted.

27.

The allegations contained in paragraph VI of the third claim of plaintiff's complaint are denied, except the allegation that the musician there re-

ferred to was included as a taxable employee, which allegation is admitted.

28.

The allegations contained in paragraph VII of the third claim of plaintiff's complaint are denied, except the allegation that the treasurer there referred to was included as a taxable employee, which allegation is admitted.

29.

The allegations contained in paragraph VIII of the third claim of plaintiff's complaint are denied, except the allegation that the trustees there referred to were included as taxable employees, which allegation is admitted. Defendant [47] avers that the trustees so included as taxable employees were three in number.

30.

Further answering the third claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO THIRD CLAIM

31.

As an affirmative defense to the third claim of plaintiff's complaint, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to the trustees referred to in paragraph VIII of the third claim of plaintiff's complaint, since these individuals do not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in

paragraph II of the third claim of plaintiff's complaint.

ANSWER TO FOURTH CLAIM

32.

The allegations contained in paragraph I of the fourth claim of plaintiff's complaint are denied, except the allegation that a credit has been allowed in the amount of \$157.70, which allegation is admitted. Defendant avers that on January 17, 1941, plaintiff filed its annual return for 1939 under Title IX of the Social Security Act; that said return indicated an amount due of \$310.79, consisting of principal of tax, penalty and interest; that said amount was paid by plaintiff.

33.

The allegations contained in paragraph II of the fourth claim of plaintiff's complaint are denied. Defendant avers that on July 16, 1941, plaintiff filed with the Collector of Internal Revenue on Treasury Form 843 what purported to be a [48] claim for refund of Federal Unemployment Compensation Taxes in the amount of \$310.79 illegally collected with respect to 1939; that said purported claim for refund set forth the grounds on which it was filed.

34.

The allegations contained in paragraph III of the fourth claim of plaintiff's complaint are admitted, except the allegation referring to Section 3773 (a) (2) which allegation, since said section has no pertinence to the matter at hand, is denied.

35.

The allegations contained in paragraph IV of the fourth claim of plaintiff's complaint are denied.

36.

The allegations contained in paragraph V of the fourth claim of plaintiff's complaint are denied, except the allegation that the two Aerie physicians referred to were included as taxable employees, which allegation is admitted.

37.

The allegations contained in paragraph VI of the fourth claim of plaintiff's complaint are denied, except the allegation that the musician there referred to was included as a taxable employee, which allegation is admitted.

38.

The allegations contained in paragraph VII of the fourth claim of plaintiff's complaint are denied, except the allegation that the treasurer there referred to was included as a taxable employee, which allegation is admitted.

39.

The allegations contained in paragraph VIII of the fourth claim of plaintiff's complaint are denied, except the allegation that the trustees there referred to were included as [49] taxable employees, which allegation is admitted. Defendant avers that the trustees so included as taxable employees were three in number.

40.

The allegations contained in paragraph IX of the fourth claim of the plaintiff's complaint are denied, except the allegation that the president and vice-president there referred to were included as taxable employes, which allegation is admitted.

41.

Further answering the fourth claim of plaintiff's complaint, defendant states that it is not indebted to plaintiff in any sum.

AFFIRMATIVE DEFENSE TO FOURTH CLAIM

42.

As an affirmative defense to the fourth claim of plaintiff's complaint, defendant alleges that this Court has no jurisdiction to grant plaintiff any relief with respect to the trustees referred to in paragraph VIII of the fourth claim of plaintiff's complaint, or with respect to the president and vice-president referred to in paragraph IX of the fourth claim of plaintiff's complaint, since these individuals do not constitute one of the grounds for relief contained in what purported to be the claim for refund referred to in paragraph II of the fourth claim of plaintiff's complaint.

Wherefore defendant prays judgment that the complaint of the plaintiff be dismissed with costs to the defendant.

/s/ J. CHARLES DENNIS

United States Attorney.

Copy received, March 29, 1943.

CHAVELLE & CHAVELLE

Attys. for Pltf.

[Endorsed]: Filed Mar. 29, 1943. [50]

[Title of District Court and Cause.]

Civil Action

No. 608

ORDER

Upon the stipulation of the above parties, through their respective attorneys, and good cause appearing therefor, it is hereby

Ordered that the above entitled case be transferred to the Southern Division of this Court for assignment for trial.

Dated this 2nd day of April, 1943.

LLOYD L. BLACK

United States District Judge

Presented by:

THOMAS R. WINTER

[Endorsed]: Filed April 7, 1943. [51]

In the District Court of the United States, for the
Western District of Washington, Southern Division

Civil Action

File No. 459

ABERDEEN AERIE No. 24 of the FRATERNAL
ORDER OF EAGLES, a corporation,
Plaintiff.

v.

UNITED STATES OF AMERICA

Defendant.

STIPULATION

It is hereby stipulated by and between the parties, through their respective attorneys, that the following facts may be taken as true at the trial of this cause or any subsequent proceedings therein:

I.

The ground of jurisdiction of this suit is that it is one arising under the Statute of the United States, namely: Title 28 of the U.S.C.A., Section 41, paragraph 20, providing for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected. This present action instituted by the plaintiff above-named is for the recovery of internal revenue taxes assessed and collected under Title VIII of the Social Security Act of the United States and subchapter A of Chapter IX of the Internal Revenue Code (Federal Insurance Contributions Act, as amended by Social Security Act Amendments of 1939).

II.

That the United States of America is a body politic and sovereign power.

III.

That the plaintiff is a corporation organized and [52] existing under the laws of the State of Washington relating to Fraternal corporations and has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington, and maintains its club premises at Aberdeen, Washington.

IV.

The plaintiff filed original and supplemental quarterly returns for 1938, and paid tax thereon of \$53.08. The original and supplemental quarterly returns were filed for 1939 on which a tax was paid of \$59.02, and for 1940, on which a tax was paid of \$57.84. Plaintiff also filed a quarterly return for the period January 1, 1941, through September 30, 1941, on which a tax was paid of \$47.51.

On January 23, 1942, plaintiff filed separate claims for refund on Form 843, as follows: For the year 1938 in the amount of \$19.24; for the year 1939 in the amount of \$22.81; for the year 1940 in the amount of \$19.20, and for the period of January 1, 1941, through September 30, 1941, in the amount of \$8.86. The claims for refund are based on the plaintiff's contention that its Aerie physician and certain of its officers are not employees for the purpose of the Social Security Act, and more particularly alleges as follows:

Year 1938

1. Tax was erroneously assessed on our doctor, trustees, and ritualistic officers.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work. His S.S. No. and name is: 534-18-9612, Dr. E. B. Riley.
3. C. B. 1937-1, 462; C. B. 1937-2, 403 and C. B. 1939-2, 295. [53]
4. The trustees and ritualistic officers receive only a nominal amount which covers their dues, and the names of those erroneously assessed as above are: J. P. Bullington, Harry Russell, Steve Yarwich, J. P. Dick Foley, Alton James, Sperry Oliver, Homer Curtis, John Heintz, Dr. Chas. Martin, John Woodcock, Luther Brownrigg, Vernon Bagley, Harry I. Tucker, Caleb Merritt.
5. No part of the above tax was paid by the so-called employees.

Year 1939

1. Tax was erroneously assessed on doctors, ritualistic officers, and trustees.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work. Dr. E. B. Riley, 534-18-9612.

3. C. B. 1937-1, 462; C. B. 1937-2, 403 & 448; C. B. 1939-2, 295.
4. The trustees and ritualistic officers receive only a nominal amount which covers their dues, and the names of those so erroneously assessed are as follows: J. P. Bullington, Harry Russell, Steve Yarwich, J. P. Dick Foley, Alton James, Sperry Oliver, Homer Curtis, John Heintz, Dr. Chas. Martin, Milton Jones, Roy Sims, H. E. West.
5. No part of the above tax was paid by the so-called employees.

Year 1940

1. Tax was erroneously assessed on our doctor elected by our members on a contract basis to render the sick and health benefits of our lodge. See: C. B. 1937-1, 462; C. B. 1937-2, 403; C. B. 1939-2, 295.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work.
3. Some of our similar organizations in the State have been classified as exempt on the doctors rendering services as above, so we would be discriminated against if we are not given the exemption. [54]
4. His name and Social Security Number is: Dr. E. B. Riley, 534-18-9612.
5. No part of the above tax was paid by the so-called employees.

Period January 1, 1941, to
September 30, 1941.

1. Tax was erroneously paid on our doctor elected by our members on a contract basis to render the sick and health benefits of our lodge. See C.B. 1937-1, 462; C.B. 1937-2, 403; C.B. 1939-2, 295.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work.
3. Some of our similar organizations in the State have been classified as exempt on the doctors rendering services as above, so would be discriminated against if we are not given the exemption.
4. His name and Social Security Number is: Dr. E. B. Riley, 534-18-9612.

V.

The Commissioner of Internal Revenue, by a letter dated October 1, 1942, disallowed plaintiff's four

claims for refund. The present action was timely filed on November 15, 1942.

J. CHAS. DENNIS

United States Attorney.

HARRY SAGER

Assistant United States
Attorney.

THOMAS R. WINTER

Special Assistant to Chief
Counsel,

Bureau of Internal Revenue.

Attorneys for Defendant.

CORNELIUS C. CHAVELLE

Attorney for Plaintiff.

[Endorsed]: Filed May 25, 1943. [55]

In the District Court of the United States for the
Western District of Washington, Northern
Division

Civil Action

So. Div. No. 510

BALLARD AERIE No. 172 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

STIPULATION

It is hereby stipulated by and between the parties, through their respective attorneys, that the following facts may be taken as true at the trial of this cause or any subsequent proceedings therein:

I.

The ground or jurisdiction of this suit is that it is one arising under the Statute of the United States, namely: Title 28 of the U.S.C.A., Section 41, paragraph 20, providing for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected. This present action instituted by the plaintiff above named is for the recovery of internal revenue taxes assessed and collected under Title IX. of the Social Security Act of the United States and also under subchapter C entitled "Tax on Employers of Eight or More" of

Title 26, Section 1600 of the United States Code and also known as Federal Unemployment Tax Act.

II.

That the United States of America is a body politic and sovereign power.

III.

That the Plaintiff is a corporation organized and [56] existing under the laws of the State of Washington relating to Fraternal Corporations and has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington.

IV.

On January 17, 1941, plaintiff filed its annual returns under Title IX of the Social Security Act for the periods indicated and on March 4, 1941, paid taxes with respect thereto as follows:

1936	\$ 18.68
1937	98.00
1938	393.82
1939	310.79

On July 16, 1941, plaintiff filed claims for refund of the amounts of tax above indicated on the ground that during these years it was not an employer of eight or more individuals and consequently not subject to this tax. Certified copies of such claims are attached hereto, marked Exhibits A, B, C and D, respectively, and made a part hereof. These claims for refund, with respect to 1936, 1938 and 1939, were denied on September 6, 1941. The claim for

refund with respect to 1937 was denied on March 25, 1942.

V.

Pursuant to a certificate of overassessment, on or about April 15, 1942, there was refunded to the plaintiff \$232.92 with respect to its taxes for 1938, and \$157.70 with respect to its taxes for 1939, being credits allowable for contributions paid by the plaintiff to the State of Washington. The result of these refunds was to reduce the net amount of taxes paid by the plaintiff for 1938 to \$160.90, and that paid for 1939 to \$153.09. [57]

VI.

The present action was commenced on or about November 4, 1942, by the plaintiff for the recovery of the following amounts, relative to the taxable periods indicated:

1936	\$ 18.68
1937	98.44

1938

160.91

1939

153.08

J. CHAS. DENNIS

United States Attorney.

HARRY SAGER

Assistant United States At-
torney.

THOMAS R. WINTER

Special Assistant to the Chief
Counsel, Bureau of Internal
Revenue.

Attorneys for Defendant.

CORNELIUS C. CHAVELLE

Attorney for Plaintiff.

[Endorsed]: Filed May 26, 1943. [58]

In the District Court of the United States for the
Western District of Washington,
Southern Division

Civil Action

File No. 459

ABERDEEN AERIE No. 24 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil Action

File No. 510

BALLARD AERIE No. 172 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil Action

File No. 466

SEATTLE AERIE No. 1 OF THE FRATERNAL
ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

CLARK SQUIRE, COLLECTOR OF INTERNAL
REVENUE OF THE UNITED STATES OF
AMERICA,
Defendant.

OPINION

Before Charles H. Leavy, United States District
Judge, Tacoma, Washington.

Cornelius C. Chavelle, Chavelle and Chavelle,
Dexter Horton Building, Seattle, Washington
Attorneys for Plaintiffs.

J. Charles Dennis, United States Attorney
Harry Sager, Asst. United States Attorney
Thomas R. Winter, Special Representative to the
General Counsel, Bureau of Internal Revenue
Attorneys for Defendant. [59]

These three cases will be considered together for the purpose of disposition, since they all involve a construction of certain parts of Titles VIII and IX of the Social Security Act before its amendment in 1939. The plaintiff in each case is a subordinate Aerie of the Fraternal Order of Eagles, and the defendant is Clark Squire, as Collector of Internal Revenue in this District. The actions are to recover sums assessed by the Government and paid by the plaintiffs.

For convenience, I shall refer to Cause No. 459 as the Aberdeen case; Cause No. 608 as the Ballard Case, and Cause No. 466 as the Seattle Case.

The specific question presented in the Aberdeen Case is whether the Aerie physician, the president, vice president and treasurer, trustees and members of the audit committee, of a subordinate Aerie of the Fraternal Order of Eagles constitute employees under Section 811(b) and Section 1101(a) of the Social Security Act and Section 1426(b) and (d) of the Internal Revenue Code for the purposes of the tax imposed under Title VIII of the Social Security Act and under the Federal Insurance Contributions Act.

In the Ballard Case, the question presented is whether the physician, the treasurer and the trustees of a subordinate Aerie of the Fraternal Order of Eagles, and a musician performing services for the Aerie, constitute employees under Title IX of the Social Security Act and Chapter 9, Subchapter C of the Internal Revenue Code.

It might be noted that in both cases mentioned the question presented are of first impression, and there is no precedent resting upon a similar set of facts.

In the Seattle Case, the question presented is whether members of an orchestra performing services for taxpayer [60] constitute its employees under the provisions of the Social Security Act and Chap. 9, Sub-chapters A and C of the Internal Revenue Code.

A disposition of the issues raised by these actions involves an interpretation of certain provisions of Titles VIII and IX of the Social Security Act, prior to its amendment in 1939. In each case there is a stipulation on file dealing with the amounts involved for the years in question, and also the individuals or groups on whom tax was paid and refund demanded. The proof submitted was very limited, heard as to the three cases at the same time.

In order to bring the Aberdeen and Ballard Aeries within the provisions of the Social Security Act prior to amendment, it is necessary to hold that the various officers of these two organizations be considered as employees as distinguished from mere ritualistic officers or independent contractors. If the facts establish the relationship of employer and employee as between these subordinate lodges and their officers, who are chosen in accordance with the provisions of their constitution provided for them by the Grand Aerie, then the actions would have to be dismissed insofar as they involve the Aberdeen and Ballard cases. If, on the other hand, that rela-

tionship does not exist, then the plaintiffs should prevail in these two cases, insofar as they have complied with the laws and regulations involving a refund of taxes erroneously assessed.

In the Seattle Case, the issue involves only the question of whether the orchestra that furnished music for dances held at regular intervals was an orchestra supplied by an independent contractor, or whether the orchestra members were employees of the Seattle Aerie. [61]

All three of these organizations are incorporated under the laws of the State of Washington, which specifically provide for the incorporation of fraternal organizations and distinguish them from commercial corporations, and relieve them from the payment of any tax or annual license fees.

With the exception of the musicians employed by the Ballard Aerie, and the orchestra that furnished music for the Seattle Aerie, all of the other individuals involved were essential and required officers of the subordinate Aeries provided for by their constitution. Their duties are enumerated in detail in constitution, and then it is provided therein what the compensation of certain officers shall be, and with other officers the matter of fixing compensation is left to the discretion of the local Aerie. This compensation, with the exception of the Aerie Physician and Secretary, is a very nominal sum, being as low as 33 1/3c per month for the Worthy President and Worthy Vice President, and a number of the other officers of the Aerie, who are either elective or appointive, receive a compensation of \$1.00 per month.

The first issue that must be disposed of here involves an interpretation of the word "employee". The Act of Congress itself gives only a most broad and comprehensive definition, and leaves detail to the Treasury Department. That Department, by Article 3, Regulation 91, furnishes a more detailed definition of the term "employee", and then distinguishes between an independent contractor and an employee.

There is a great wealth of authority to be found on the question of when one is an employee. No good could come from attempting to analyze in any degree of detail [62] the innumerable cases touching this subject. It does seem to this Court that a very clear statement as to when the relationship of employer and employee exists is found in 35 Am. Jur., Page 445, Sec. 3, Master and Servant, where *is* is stated:

"While it is said that at common law there are four elements which are considered upon the question whether the relationship of master and servant exists,—namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of the control of the servant's conduct,—the really essential element of the relationship is the right of control—the right of one person, the master, to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work shall be done."

In *Deecy Products Co. v. Welch*, 124 Fed. 2nd 592, a well-considered opinion from the First Circuit, dealing with an interpretation of the provisions of the Social Security Act herein involved, the Court said:

“We hold that an employee is one who meets the tests of the more or less established concept of ‘the legal relationship of employer and employee’ ”.

We need but cite this case from the First Circuit Court of Appeals to note that the construction and application of the laws herein involved are based upon the accepted tests as enumerated in the quotation from American Jurisprudence.

It is argued by the plaintiffs that the Act, as originally passed by Congress, never intended to include fraternal organizations, and this was established by the very fact that when, by Departmental regulation and interpretation, they were included, Congress immediately clarified the Act by excluding them. The case of *Hassett vs. Associated Hospital Service Corporation*, 125 Fed. 2nd 611, from the First Circuit, strongly supports the position taken by the plaintiffs. [63] The Court said:

“That the Congress in enacting the Social Security Act did not expressly exempt corporations operating a non-profit hospital service plan does not legitimately warrant the inference that Congress intended such organizations not to be exempt from the Act.”

I do not feel that *is* is necessary, in making a

disposition of these cases, to decide what the intent of Congress was in enacting the Act, insofar as it involved groups, classes and persons to be exempt, and shall therefore rest my decision entirely upon the question of whether the members of fraternal organizations, as here involved, when occupying official positions, either by election of their fellow members or by appointment of the elected presiding officer, such positions being for a limited term, usually one year, should be classified as employees and the subordinated lodge itself classified as an employer. This consideration, of course, excludes the issue of the orchestra, and to a degree, that of the Aerie Physician. A determination of this issue, however, becomes important on the question as to whether or not there were eight or more regular employees, as required by law.

Under the stipulations on file herein, and by the admissions of the pleadings and the proof offered at the time of trial, it is clear that all of those involved in the tax levy in the Aberdeen and Ballard Cases fall within the class above enumerated; that is, they are all officers of the subordinate Aeries that are strictly and primarily fraternal organizations, having over them a Grand Aerie that provides the Constitution for such subordinate Aeries, and expressly outlines the duties and responsibilities of the elected and appointed officers in connection with the ritualistic work of this fraternal organization. An [64] examination of the Constitution, under which each of the subordinate Aeries here involved operates, readily establishes the fact that it is in no sense a

commercial or profit making corporation, and that the sums given to the officers are not intended to be financial remunerations for services, but, at most, would have to be classified as mere honorariums.

Being an officer of a subordinate Aerie is a distinction and honor conferred upon the individual by his fellow members, because of ability, faithfulness in observing ritualistic requirements, and a demonstrated belief in the objectives of the fraternity. There is no assured tenure of service beyond the limit of time fixed by the constitution, and the service, under no stretch of imagination, can be considered as a means of procuring a livelihood, or being made the basis for the payment of unemployment compensation. It seems to me that it has required a strict and even strained construction of both the Act and the regulations to bring the officers of these subordinate Aeries within the provisions thereof. I hold, therefore, that all of the officers of these subordinate Aeries are ritualistic officers, and as such are not included within the terms and provisions of Titles VIII and IX of the Social Security Act of 1935, 42 U.S.C.A.

The musician employed by the Ballard Aerie, who received a compensation of \$2.50 per meeting, is not a ritualistic officer, as provided by the constitution, and, at first blush, it might appear that he should be included under the provisions of the Act, but an analysis of the service that he performs, being for a period of an hour or two each week, and a requirement that he be a member of the fraternity, readily establishes the fact that his services are

casual and incidental insofar as the fraternity is concerned, and would be exempt under the provisions of [65] Title VIII, Sec. 811(b)(3) Social Security Act, 1935.

I have already found that the Aerie Physician is a ritualistic officer, and that, of itself, would exempt him from inclusion herein, but he would likewise have to be excluded as an employee under the accepted definition of that term, because it is admitted that his services, aside from his ritualistic duties, are purely professional, and are rendered entirely exclusive of any control being exercised by the subordinate Aerie; every detail of the professional services rendered by the Physician to the members of the fraternity or their families, is wholly within the exercise of discretion by the Physician, and the relationship of physician and patient is clearly established when a member of the fraternity or his family accepts the services of the physician. The responsibilities and immunities that go with that relationship exist in all instances in the treatment supplied by the Physician to the patient. His status becomes that of any other private physician. The Physician must, therefore, be considered as excluded from the provisions of the Act here involved upon the ground: first, that he is a ritualistic officer; second, that his services are purely professional and excluded by Departmental Regulation; and, third, that he is an independent contractor.

We come now to the last issue involved herein, and that is the employment of an orchestra by the Seattle Aerie.

I shall not endeavor to enumerate all of the elements that exist here, but the undisputed facts and admissions clearly establish the contention of the plaintiff that the orchestras, during the years here involved, supplied music through an independent contractor. *Is* is enough to say that the Aerie itself:

1. Exercised no right to direct the performance of any [66] individual member of the orchestra.
2. Had nothing to do with the selection of any individual member.
3. Was under no legal obligation to pay any wage or salary to any individual member.
4. Could not discharge any individual member.
5. Did not even direct the type of music to be played nor furnish such music.
6. Did not furnish any of the instruments, aside from a piano.

The facts further disclose that:

1. The orchestra operated under the name of its leader.
2. Its services were contracted for with the leader.
3. All payment for such services was made to the leader.

The leader was not an employee of the Seattle Aerie, but his status was quite clearly that of an independent contractor, and I so find.

The case of *Williams vs. U. S.*, 126 Fed. 2nd 129, is decisive of this issue. This case comes from the Seventh Circuit, and reverses the lower court in its decision. The principle announced in this case has

been approved in this Circuit, the Ninth, in the case of Anglin vs. Empire Star Mines Co., 129 Fed. 2nd 914, and these decisions are binding upon this Court upon this issue, and make the law of this case. The facts in the Williams case, supporting the contention that he was an independent contractor, are not nearly so strong as in the case at bar, because there the services were being performed for the use and benefit of strictly commercial organizations, as distinguished from a fraternal organization here.

It was said in the Williams case *supra*:

“We think the record discloses without question [67] that the right to hire and discharge was the sole prerogative of the plaintiff”.

In this case that right vested solely in the leader of the orchestra and not in the Seattle Aerie. The Treasury regulations under which these assessments are made, Art. 3, Reg. 91, provide:

“In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work, and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not, as to such services, an employee”.

The record as made in this case clearly brings the orchestra that furnished music to the Seattle Aerie within this definition.

The government makes much of the contention that the union scale was the standard by which com-

pensation was paid to the orchestra, the leader receiving ten per cent more than the individual employees. That was established in this case, but, of itself, it can not be the controlling factor in the establishment of the relationship of employer and employee.

I have endeavored to cover the issues that have been raised in this group of cases as fully as is necessary to permit the preparation and submission of findings of fact and *and* conclusions of law and a decree, and I have refrained from citation of numerous authorities or an analysis of the many authorities that have been presented in the course of the trial, because it would unduly extend this opinion, and serve no useful purpose to either of the parties involved.

Dated at Tacoma, Washington, this 9th day of July, 1943.

/s/ CHARLES H. LEAVY

United States District Judge.

[Endorsed]: Filed July 10, 1943. [68]

In the District Court of the United States for the
Western District of Washington, Southern
Division

Civil Action

File No. 459

ABERDEEN AERIE No. 24 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause having come on regularly for trial on the 25th day of May, 1943, before the Honorable Charles H. Leavy, United States District Judge, and without a jury and the plaintiff appearing in person and through their attorneys, Cornelius C. Chavelle, Esq., Chavelle & Chavelle, and the defendant appearing through its attorney, Thomas R. Winter, Esq., and from the evidence introduced by both parties the Court makes the following

FINDINGS OF FACT

I.

This present action instituted by the plaintiff above named is for the recovery of internal revenue taxes assessed and collected under Title VIII of

the Social Security Act of the United States and subchapter A of Chapter IX of the Internal Revenue Code (Federal Insurance Contributions Act, as amended by Social Security Act Amendments of 1939).

II.

That the United States of America is a body politic and sovereign power.

III.

That the plaintiff is a corporation organized and existing under the laws of the State of Washington relating to Fraternal corporations and has paid all license fees now due [69] and owing by it to operate a fraternal corporation in the State of Washington, and maintains its club premises at Aberdeen, Washington.

IV.

The plaintiff filed original and supplemental quarterly returns for 1938, and paid taxes thereon of \$53.08. The original and supplemental quarterly returns were filed for 1939 on which a tax was paid of \$59.02, and for 1940, on which a tax was paid of \$57.84. Plaintiff also filed a quarterly return for the period January 1, 1941, through September 30, 1941, on which a tax was paid of \$47.51.

On January 23, 1942, plaintiff filed separate claims for refund on Form 843, as follows: For the year 1938 in the amount of \$19.24; for the year 1939 in the amount of \$22.81; for the year 1940 in the amount of \$19.20, and for the period of Jan-

uary 1, 1941, through September 30, 1941, in the amount of \$8.86. The claims for refund are based on the plaintiff's contention that its Aerie physician and certain of its officers are not employees for the purpose of the Social Security Act, and more particularly alleges as follows:

Year 1938

1. Tax was erroneously assessed on our doctor, trustees, and ritualistic officers.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work. His S. S. No. and name is: 534-18-9612, Dr. E. B. Riley.
3. C. B. 1937-1, 462; C. B. 1937-2, 403 and C. B. 1939-2, 295.
4. The trustees and ritualistic officers receive only a nominal amount which covers their dues, and the names of those erroneously assessed as above are: J. P. Bullington, Harry Russell, Steve Yarwich, J. P. Dick Foley, Alton James, Sperry Oliver, Homer Curtis, John Heintz, Dr. Charles Martin, John Woodcock, Luther Brownrigg, Vernon Bagley, Harry I. Tucker, Caleb Merritt. [70]
5. No part of the above tax was paid by the so-called employees.

Year 1939

1. Tax was erroneously assessed on doctors, ritualistic officers, and trustees.

2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work. Dr. E. B. Riley, 534-18-9612.
3. C. B. 1937-1, 462; C. B. 1937-2, 403 & 448; C. B. 1939-2, 295.
4. The trustees and ritualistic officers receive only a nominal amount which covers their dues, and the names of those so erroneously assessed are as follows: J. P. Bullington, Harry Russell, Steve Yarwich, J. P. Dick Foley, Alton James, Sperry Oliver, Homer Curtis, John Heintz, Dr. Charles Martin, Milton Jones, Roy Sims, H. E. West.
5. No part of the above tax was paid by the so-called employees.

Year 1940

1. Tax was erroneously assessed on our doctor elected by our members on a contract basis to render the sick and health benefits of our lodge. Sec: C. B. 1937-1, 462; C. B. 1937-2, 403; C. B. 1939-2, 295.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work.

3. Some of our similar organizations in the State have been classified as exempt on the doctors rendering services as above, so we would be discriminated against if we are not given the exemption.
4. His name and Social Security Number is: Dr. E. B. Riley, 534-18-9612.
5. No part of the above tax was paid by the so-called employees.

Period January 1, 1941, to
September 30, 1941.

1. Tax was erroneously paid on our doctor elected by our members on a contract basis [71] to render the sick and health benefits of our lodge. See C. B. 1937-1, 462; C. B. 1937-2, 403; C. B. 1939-2, 295.
2. The doctor furnishes his own instruments and facilities, and we have no control over his work or time devoted to the benefit of our members. He is not paid any fixed salary and is required to give no fixed amount of time to our work.
3. Some of our similar organizations in the State have been classified as exempt on the doctors rendering services as above, so would be discriminated against if we are not given the exemption.
4. His name and Social Security Number is: Dr. E. B. Riley, 534-18-9612.

V.

The Commissioner of Internal Revenue, by a letter dated October 1, 1942, disallowed plaintiff's four claims for refund. The present action was timely filed on November 15, 1942.

VI.

That from 1938 to September 30, 1941, the plaintiff had certain essential and required officers of its subordinate Aerie as provided for by the Grand Aerie Constitution, namely: an Aerie physician, President, Vice President, Treasurer, Trustees and members of an Auditing Committee. The duties of these various officers are enumerated in detail in the Grand Aerie Constitution. The compensation that they are to receive is in some instances fixed by the constitution and in others fixed by this Aerie.

VII.

That the compensation of these officers, with the exception of the Aerie physician and the Secretary, is nominal but as low as 33 1/3c per month for the Worthy President and the Worthy Vice President and a number of other officers of the plaintiff Aerie who are either elective or appointive receive a compensation of \$1.00 per month.

VIII.

That the Aerie physician, the President and Vice President, [72] Treasurer, Trustees and members of the Auditing Committee are officers of the plaintiff Aerie which is strictly and primarily a Fraternal Organization.

IX.

That the plaintiff Aerie is not a commercial or profit-making corporation.

X.

That all of the officers of the plaintiff's subordinate Aerie are ritualistic officers.

XI.

That the Aerie physician involved is a ritualistic officer. His services are purely professional and the services rendered by him are wholly within the exercise of the discretion of the physician and rendered entirely exclusive of any control on the part of the plaintiff Aerie.

Done in Open Court this 14th day of Sept., 1943.

CHARLES H. LEAVY,

Judge.

And from the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That all of the officers of the plaintiff's subordinate Aerie are ritualistic officers and as such are not included within the terms and provisions of Titles VIII and IX of the Social Security Act of 1935.

II.

That the Aerie physician is a ritualistic officer and an independent contractor and is not an employee of the plaintiff Aerie and must be con-

sidered excluded from the provisions of the Social Security Act. [73]

III.

Judgment is hereby entered for the plaintiff against the defendant in the sum of \$74.22, with interest from date as provided by law, and with costs and disbursements herein to be taxed by the Clerk of this Court.

Done in Open Court this 14th day of September, 1943.

CHARLES H. LEAVY,
Judge.

Presented by:

CORNELIUS C. CHAVELLE,
Of Chavelle & Chavelle, At-
torneys for Plaintiff.

Approved by:

THOMAS R. WINTER,
Attorney for Defendant.

[Endorsed]: Filed Sept. 14, 1943. [74]

In the District Court of the United States for the
Western District of Washington, Southern
Division

Civil Action

File No. 510

BALLARD AERIE No. 172 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause having come on regularly for trial on the 25th day of May, 1943, before the Honorable Charles H. Leavy, United States District Judge, and without a jury and the plaintiff appearing in person and through their attorneys, Cornelius C. Chavelle, Esq., Chavelle & Chavelle, and the defendant appearing through its attorney, Thomas R. Winter, Esq., and from the evidence introduced by both parties the Court makes the following

FINDINGS OF FACT

I.

This present action instituted by the plaintiff above named is for the recovery of internal revenue taxes assessed and collected under Title IX. of the Social Security Act of the United States and

also under subchapter C entitled "Tax on Employers of Eight or More" of Title 26 Section 1600 of the United States Code and also known as Federal Unemployment Tax Act.

II.

That the United States of America is a body politic and sovereign power.

III.

That the plaintiff is a corporation organized and existing under the laws of the State of Washington relating to [75] Fraternal Corporations and has paid all license fees now due and owing by it to operate a fraternal corporation in the State of Washington.

IV.

On January 17, 1941, plaintiff filed its annual returns under Title IX of the Social Security Act for the periods indicated and on March 4, 1941, paid taxes with respect thereto as follows:

1936	\$ 18.68
1937	98.44
1938	393.82
1939	310.79

On July 16, 1941, plaintiff filed claims for refund of the amounts of tax above indicated on the ground that during these years it was not an employer of eight or more individuals and consequently not subject to this tax. Certified copies of such claims are attached hereto, marked Exhibits A, B, C and D, respectively, and made a part hereof. These claims

for refund, with respect to 1936, 1938 and 1939, were denied on September 6, 1941. The claim for refund with respect to 1937 was denied on March 25, 1942.

V.

Pursuant to a certificate of overassessment, on or about April 15, 1942, there was refunded to the plaintiff \$232.92 with respect to its taxes for 1938, and \$157.70 with respect to its taxes for 1939, being credits allowable for contributions paid by the plaintiff to the State of Washington. The result of these refunds was to reduce the net amount of taxes paid by the plaintiff for 1938 to \$160.90, and that paid for 1939 to \$153.09.

VI.

The present action was commenced on or about November 4, 1942, by the plaintiff for the recovery of the following amounts, relative to the taxable periods indicated: [76]

1936	\$ 18.68
1937	98.44
1938	160.91
1939	153.08

VII.

That from 1936 to 1940 the plaintiff had certain essential and required officers of its subordinate Aerie as provided for by the Grand Aerie Constitution, namely: Aerie physicians, Treasurer, Trustees, and a musician and others not in issue herein. The duties of these various officers are enumerated

in detail in the Grand Aerie Constitution. The compensation they are to receive is fixed by the Constitution for subordinate Aeries.

VIII.

That the compensation these officers receive is nominal and is low as 33 1/3c per month in some instances and a number of other officers of the plaintiff Aerie who are in some instances elective and others appointive receive a compensation of \$1.00 per month.

IX.

That the musician is appointed by the Worthy President and receives a compensation of \$2.50 per meeting. The services that he performs require an hour or two each week and he is required to be a member of the plaintiff organization, and further, the services that the musician renders are casual and incidental.

X.

That the Aerie physicians, the Treasurer and the Trustees of the plaintiff Aerie are officers of said Aerie which is strictly and primarily a fraternal organization.

XI.

That the plaintiff Aerie is not a commercial or profit-making corporation.

XII.

That the individuals involved herein, with the exception [77] of the musician, are ritualistic officers of the plaintiff Aerie and their duties are pre-

scribed in the Constitution for subordinate Aeries which is promulgated by the Grand Aerie of the Fraternal Order of Eagles.

XIII.

That the Aerie physicians involved are ritualistic officers and the services rendered by them are purely professional and are wholly within the exercise of the discretion of the physicians and are rendered entirely exclusive of any control on the part of the plaintiff Aerie.

Done in Open Court this 14th day of Sept., 1943.

CHARLES H. LEAVY,

Judge.

And from the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That all of the officers of the plaintiff's subordinate Aerie are ritualistic officers and as such are not included within the terms and provisions of Title VIII and IX of the Social Security Act of 1935.

II.

That the Aerie physicians are ritualistic officers and independent contractors and are not employees of the plaintiff Aerie and must be considered excluded from the terms and provisions of the Social Security Act.

III.

That the Aerie musician is not the employee under provisions of Titles VIII and IX of the Social Security Act of 1935. [78]

IV.

Judgment is hereby entered for the plaintiff against the defendant in the sum of \$431.11, with interest from date as provided by law, and with costs and disbursements herein to be taxed by the Clerk of this Court.

Done in Open Court this 14th day of September, 1943.

CHARLES H. LEAVY,
Judge.

Presented by:

CORNELIUS C. CHAVELLE,
Of Chavelle & Chavelle, At-
torneys for Plaintiff.

Approved by:

THOMAS R. WINTER,
Attorneys for Defendant.

[Endorsed]: Filed Sept. 14, 1943. [79]

In the District Court of the United States for the
Western District of Washington, Southern
Division

Civil Action

File No. 510

BALLARD AERIE No. 172 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

DECREE

This Cause having come on regularly for trial on the 25th day of May, 1943, before the Honorable Charles H. Leavy, United States District Judge, and without a jury and the plaintiff appearing in person and through their attorneys, Cornelius C. Chavelle, Esq., Chavelle & Chavelle, and the defendant appearing through its attorney, Thomas R. Winter, Esq., Special Representative to the General Counsel of the Bureau of Internal Revenue, whereupon witnesses on the part of the plaintiff were duly sworn and examined and documentary evidence introduced by the respective parties and the evidence being closed the cause was submitted to the Court for consideration and decision and after deliberation thereon the Court caused to be filed its written opinion whereby a judgment was

Ordered that the Ballard Aerie No. 172 of the Fraternal Order of Eagles, a corporation, do have

and recover of and from the defendant, United States of America, the sum of \$431.11, together with interest from date as provided by law and plaintiff's costs and disbursements herein to be taxed.

Done in Open Court this 14th day of Sept., 1943.

CHARLES H. LEAVY,

Judge.

Presented by:

CORNELIUS C. CHAVELLE,

Of Chavelle & Chavelle, Attorneys for Plaintiff.

Approved by:

THOMAS R. WINTER,

Attorney for Defendant.

[Endorsed]: Filed Sept. 14, 1943. [80]

In the District Court of the United States for
the western District of Washington, Southern
Division

Civil Action

File No. 459

ABERDEEN AERIE No. 24 OF THE FRA-
TERNAL ORDER OF EAGLES, a corpora-
tion,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

DECREE

This Cause having come on regularly for trial on the 25th day of May, 1943, before the Honorable Charles H. Leavy, United States District Judge, and without a jury and the plaintiff appearing in person and through their attorneys, Cornelius C. Chavelle, Esq., Chavelle & Chavelle, and the defendant appearing through its attorney, Thomas R. Winter, Esq., Special Representative to the General Counsel of the Bureau of Internal Revenue, whereupon witnesses on the part of the plaintiff were duly sworn and examined and documentary evidence introduced by the respective parties and the evidence being closed the cause was submitted to the Court for consideration and decision and after deliberation thereon the Court caused to be filed its written opinion whereby a judgment was

Ordered that the Aberdeen Aerie No. 24 of the

Fraternal Order of Eagles, a corporation, do have and recover of and from the defendant, United States of America, the sum of \$74.22, together with interest from date as provided by law and plaintiff's costs and disbursements herein to be taxed.

Done in Open Court this 14th day of Sept., 1943.

CHARLES H. LEAVY

Judge [81]

Presented by:

CORNELIUS C. CHAVELLE

Of Chavelle & Chavelle

Attorneys for Plaintiff

Approved by:

THOMAS R. WINTER

Attorney for Defendant

[Endorsed]: Filed Sept. 14, 1943. [82]

In the District Court of the United States for
the Western District of Washington, Southern
Division

Civil No. 510

BALLARD AERIE No. 172 OF THE FRA-
TERNAL ORDER OF EAGLES, a corpora-
tion,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION OF FACTS

The parties to the above entitled action, by their respective attorneys, stipulate that for the purpose of this action the facts stated herein may be accepted as true, admitted in evidence, and made a part of the record, and said parties further agree as follows:

1.

During 1936 plaintiff had in its employ five individuals whose status is not in issue in this action and whose relationship to plaintiff is conceded to have been that of employees for purposes of Title IX of the Social Security Act.

2.

During 1936 the only individuals whose relationship to plaintiff as employees is in issue in this action are: two physicians, one musician and one treasurer.

3.

During 1937 plaintiff had in its employ five individuals whose status is not in issue in this action and whose relationships to plaintiff is conceded to have been that of employees for purposes of Title IX of the Social Security Act. [83]

4.

During 1937 the only individuals whose relationship to plaintiff as employees is in issue in this action are: three physicians and one musician.

5.

During 1938 plaintiff had in its employ five individuals whose status is not in issue in this action and whose relationship to plaintiff is conceded to have been that of employees for purposes to Title IX of the Social Security Act.

6.

During 1938 the only individuals whose relationship to plaintiff as employees is in issue in this action are: two physicians, one musician, and one treasurer.

7.

During 1939 plaintiff had in its employ five individuals whose status is not in issue in this action and whose relationship to plaintiff is conceded to have been that of employees for purposes of Title IX of the Social Security Act.

8.

During 1939 the only individuals whose relationship to plaintiff as employees is in issue in this action are: two physicians, one musician, and one treasurer.

9.

If any or all of the individuals whose relationship to plaintiff as employees in issue are determined to be employees of plaintiff, it is conceded that such individuals were employees for purposes of Title IX of the Social Security Act. [84]

10.

The parties hereto agree that the findings of fact and conclusions of law adopted by the District Court in this action on September 14, 1943 may be revised so as to set forth the contents of this stipulation.

Dated this 10th day of December, 1943.

S/ CORNELIUS C. CHAVELLE

Attorney for Ballard Aerie

S/ J. CHARLES DENNIS

United States Attorney

Copy received this 10th day of Dec. 1943.

CHAVELLE & CHAVELLE

S/ CORNELIUS C. CHAVELLE

By RRM

[Endorsed]: Filed Dec. 11, 1943. [84a]

[Title of District Court and Cause.]

No. 510

ORDER

It appearing to the court that the parties to this action have stipulated in writing as to certain facts concerning the issues involved in this cause, and further that said stipulation may be admitted in evidence and made a part of the record, and the court having considered the matter, it is,

Ordered that the stipulation of the parties herein dated December 10, 1943 be and the same hereby is admitted in evidence in this cause and made a part of the record herein and that the Findings of Fact and Conclusions of Law heretofore entered in this cause shall be considered, amended and revised so as to include the matter set forth in said stipulation.

Done in Open Court this 11th day of December, 1943.

S/ CHARLES H. LEAVY
United States District Judge

Presented by:

S/ HARRY SAGER
Assistant U. S. Attorney

[Endorsed]: Filed Dec. 11, 1943. [85]

United States District Court
Western District of Washington
Southern Division

No. 459

ABERDEEN AERIE No. 24 OF THE FRA-
TERNAL ORDER OF EAGLES, a corpora-
tion,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that the defendant, United States of America, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the above entitled case entered on September 14, 1943, awarding judgment against the defendant, and on behalf of the plaintiff in the sum of \$74.22, together with interest from date and plaintiff's costs and disbursements to be taxed.

Dated this 10th day of December, 1943.

S/ J. CHARLES DENNIS

United States Attorney

S/ HARRY SAGER

Assistant United States At-
torney

S/ THOMAS R. WINTER

General Counsel Repre-
sentative

Copy mailed to Cornelius C. Chavelle, Attorney
for Plaintiff this 10th day of December, 1943.

S/ E. REDMAYNE,

Dep. Clerk

[Endorsed]: Filed Dec. 10, 1943. [86]

United States District Court
Western District of Washington
Southern Division

No. 510

BALLARD AERIE #172 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that the defendant, United States of America, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the above entitled case entered on September 14, 1943, awarding judgment against the defendant, and on behalf of the plaintiff in the sum of \$431.11, together with interest from date and plaintiff's costs and disbursements to be taxed.

Dated this 10th day of December, 1943.

S/ J. CHARLES DENNIS

United States Attorney

S/ HARRY SAGER

Assistant United States At-
torney

S/ THOMAS R. WINTER

General Counsel Repre-
sentative

Copy mailed to Cornelius C. Chavelle, Attorney
for Plaintiff this 10th day of December, 1943.

S/ E. REDMAYNE,

Dep. Clerk

[Endorsed]: Filed Dec. 10, 1943. [87]

In the District Court of the United States for
the Western District of Washington, Southern
Division

No. 459

ABERDEEN AERIE No. 24 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER EXTENDING TIME TO DOCKET
APPEAL

It is ordered that the time within which to docket
the record on appeal is hereby extended to and in-
cluding March 9, 1944.

Done in open court this 17th day of January,
1944.

CHARLES H. LEAVY

United States District Judge

Presented by:

THOMAS R. WINTER

Attorney for Defendant

Approved:

CORNELIUS C. CHAVELLE

Attorney for Plaintiff

[Endorsed]: Filed Jan. 17, 1944. [88]

In the District Court of the United States for
the Western District of Washington, Southern
Division

No. 510

BALLARD AERIE No. 172 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER EXTENDING TIME TO
DOCKET APPEAL

It is ordered that the time within which to docket
the record on appeal is hereby extended to and in-
cluding March 9, 1944.

Done in open court this 17th day of January,
1944.

CHARLES H. LEAVY

United States District Judge

Presented by:

THOMAS R. WINTER

Attorney for Defendant

Approved:

CORNELIUS C. CHAVELLE

Attorney for Plaintiff.

[Endorsed]: Filed Jan. 17, 1944. [89]

In the District Court of the United States for
the Western District of Washington, Southern
Division

No. 459

ABERDEEN AERIE No. 24 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

No. 510 Tacoma

No. 608 Seattle

BALLARD AERIE No. 172 OF THE FRATER-
NAL ORDER OF EAGLES, a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

ORDER RE EXHIBITS

Upon application of the attorney for the defend-
ant and appellant in the above-entitled causes, and
good cause appearing therefor, it is hereby

Ordered that all original exhibits in these causes
be certified and transmitted to the United States
Circuit Court of Appeals for the Ninth Circuit in
connection with the appeals of these cases.

Dated this 29th day of Jan., 1944.

CHARLES H. LEAVY

Judge

Presented by

HARRY SAGER

Asst. U. S. Atty.

THOMAS R. WINTER

Approved as to form

CORNELIUS C. CHAVELLE

Attorney for Plaintiffs

[Endorsed]: Filed Jan. 29, 1944. [90]

[Title of District Court and Causes.]

STIPULATION DESIGNATING CONTENTS
OF RECORD ON APPEALS

To the Clerk of the above Court:

The above-entitled causes, together with Seattle Aerie No. 1 of the Fraternal Order of Eagles, a corporation, plaintiff, v. Clark Squire, Collector of Internal Revenue of the United States of America, defendant, Cause No. 466, having been consolidated for trial, the plaintiffs and the defendant, through their respective attorneys, now hereby stipulate that the cases be consolidated on appeal for the purpose of record, argument, briefing, opinion and judgment, and do hereby designate as necessary for the consideration of these appeals the following to be contained in the record on appeals;

1. Complaints in both causes, Nos, 459 and 510.

2. Answer' and amended answer in Cause Nos. 459 and 510, respectively. [91]

3. Stipulation filed May 25, 1943, in Cause No. 459, and Stipulation filed May 26, 1943, in Cause No. 510.

4. Opinion filed July 10, 1943.

5. Findings of Fact and Conclusions of Law filed in Cause Nos. 459 and 510.

6. Stipulation of Facts, filed December 11, 1943, in Cause No. 510.

7. Order filed December 11, 1943, in Cause No. 510.

8. Decrees filed in Cause Nos. 459 and 510.

9. Notices of Appeal filed in Cause Nos. 459 and 510.

10. Orders Extending Time, filed January 17, 1944, in Cause Nos. 459 and 510.

11. Reporter's original transcript, Volumes 1 and 2, except that there be deleted from the certification all material beginning at Line 24 on page 6, to and including Line 11 on page 42, in Volume 2 of the transcript, which has reference solely to the case of Seattle Aerie No. 1 of the Fraternal Order of Eagles, a corporation, v. Clark Squire, Collector of Internal Revenue of the United States of America, the appeal in which has been dismissed by agreement.

12. All exhibits in Cause Nos. 459 and 510 to be certified in their original form.

13. Order Re Exhibits.

14. This Designation of Contents of Record on Appeals.

Dated this 24th day of January, 1944.

(Sgd.) J. CHAS. DENNIS

United States Attorney

(Sgd.) HARRY SAGER

Assistant United States At-
torney

(Sgd.) THOMAS R. WINTER

Assistant to the Chief Coun-
sel, Bureau of Internal
Revenue.

Attorneys for Defendant.

(Sgd.) CORNELIUS C. CHAVELLE

Attorney for Plaintiffs. [92]

[Title of District Court and Causes.]

CLERK'S CERTIFICATE

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript of the Record on Appeal, consisting of pages numbered 1 to 92, inclusive, is a full, true and correct copy of so much of the records, papers and proceedings in Cause 459, Aberdeen Aerie No. 24 of the Fraternal Order of Eagles, a corporation, Plaintiff and Appellee, vs. United States of America, Defendant and Appellant, and in Cause No. 510, Ballard Aerie No. 172 of the Fraternal Order of Eagles, a corporation, Plaintiff and Appellee, vs. United States of America, Defendant and Appellant, as required by the Stipula-

tion of the parties herein designating the contents of the consolidating record on appeal, the original of which is on file and of record in my office at Tacoma, Washington, the same constituting the Transcript of the Record on Appeal from the Judgment of the United States District Court for the Western [93] District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the original Reporter's Transcript of Evidence (Volumes I and II), is transmitted herewith, except that pursuant to Item 11 of the Stipulation Designating the Contents of the Record on Appeal, there be deleted from certification on appeal all material beginning at Line 24 of Page 6 to and including Line 11 of Page 42 in Volume II of said Reporter's Transcript of Evidence, said pages having reference solely to a case the appeal in which has been dismissed by agreement.

I further certify that the original State of Points to be Relied Upon and the original Stipulation for Designation of Record for Printing, in each of the above-captioned cases, are transmitted herewith.

I further certify that Plaintiff's original exhibits, numbered 1 to 7, inclusive, in Cause 459, and numbered 1 to 4, inclusive, in Cause No. 510, are transmitted herewith.

I further certify that the following is a full, true and correct statement of the Clerk's fees and charges incurred on behalf of the Defendant-Appellant in the preparation and certification of the

Transcript of the Record on Appeal herein to the
United States Circuit Court of Appeals for the
Ninth Circuit, to-wit:

Appeal fee, Cause 459	\$ 5.00
Appeal fee, Cause 510	5.00
To preparing and comparing Transcript on Appeal, 264 folios @ 5c per folio.....	13.20
Clerk's certificate50

\$23.70

[94]

In Testimony Whereof I have hereunto set my
hand and affixed the seal of said Court, at the City
of Tacoma, Washington, this 10th day of February,
1944.

[Seal]

JUDSON W. SHORETT,

Clerk

By E. E. REDMAYNE

Deputy [95]

In the District Court of the United States, for the
Western District of Washington, Southern Division

Civil Action

File No. 459

(Consolidated with 466 & 510)

ABERDEEN AERIE No. 24 of the FRATERNAL
ORDER OF EAGLES, A Corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

Be It Remembered, That this cause came regularly on for hearing before the Hon. Charles H. Leavy, Judge of the above-entitled court, at Tacoma, Washington, on May 25, 1943.

Appearances:

For the Plaintiff,

Mr. Cornelius Chavelle of Messrs. Chavelle
& Chavelle

For the Defendant,

Mr. Thomas R. Winter, Special Assistant
to the Chief Counsel.

Both sides having announced themselves ready for trial, the following proceedings were had: [3*]

* Page numbering appearing at foot of page of original Reporter's Transcript.

DR. EDWARD B. RILEY,

A witness called on behalf of the Plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Will you state your name, please?

A. Edward B. Riley.

Q. Where do you reside? A. Aberdeen.

Q. What is your occupation?

A. Physician.

Q. Just how long have you been a physician, Doctor? A. Thirty-three years.

Q. And at all times in the city of Aberdeen?

A. Yes, sir.

Q. Have you had some connection with Aberdeen Aerie No. 24 Fraternal Order of Eagles in the past few years? A. Yes, sir.

Q. In what capacity? A. Aerie physician.

Q. When did you become physician?

A. January, 1917.

Q. Doctor, ever since that time have you been the Aerie physician for Aberdeen Aerie?

A. I have.

Q. Did they have any other Aerie physician outside of yourself?

A. Yes, sir; at one time many years ago there was a [4] second physician, at the time I was appointed.

Q. Doctor, will you state how you became an aerie physician?

A. By election of the membership of the aerie.

(Testimony of Dr. Edward B. Riley.)

Q. Doctor, did some one contact you prior to your election or not? A. No, sir.

Q. Where is your office, Doctor, in Aberdeen?

A. The Finch Building.

Q. How long have you been in the Finch Building?

A. Since about the day it was opened, April 1, 1910.

Q. (By the Court): Let me ask you right there: How can you lose your position with the aerie, Doctor? Who can discharge you?

A. I can be discharged by filing a hearing for failure to properly conduct my duties.

Q. A charge can be filed on the part of the membership or the Board of Trustees?

A. Any person, any member, who might become dissatisfied with my services could have reason, if he so desired, to bring a charge against me on account of what he might consider improper services, and then those charges would be presented to the Worthy President, and he would instruct them that a hearing be held with the officers of the aerie.

Q. (By Mr. Chavelle): Then would the members have a vote on that? A. Yes.

Q. Doctor, in other words, you can't be summarily discharged?

A. That is correct. [5]

Q. Do you employ any assistants in your office?

A. No, sir.

Q. Who pays the rent for your office, Doctor?

A. I pay it.

(Testimony of Dr. Edward B. Riley.)

Q. Does the Fraternal Order of Eagles contribute towards the payment of your rent?

A. No, sir.

Q. Now, will you explain, Doctor, the basis of your remuneration?

A. I am paid 50 cents per member per quarter for all members in good standing during the previous quarter. In other words, I am paid in the month of April, and July, October and January 50 cents per quarter for members in good standing during the previous quarter.

Q. In other words, Doctor, if there were a thousand members belonging to Aberdeen Aerie No. 24 and they were all in good standing, your remuneration is based upon 1000 members at 50 cents a member? Is that correct?

A. That is correct, for three months.

Mr. Winter: I object to what might be as immaterial, as far as this case is concerned.

The Court: Let's proceed.

Q. (By Mr. Chavelle): Now, Doctor, during the period of 1938-'39 were you employed by Aberdeen Aerie No. 24 of the Fraternal Order of Eagles as Aerie physician?

A. I was Aerie physician in Aberdeen Aerie No. 24 of the Fraternal Order of Eagles during those years.

Q. In 1939 and 1940 were you the Aerie Physician for Aberdeen Aerie No. 24, Fraternal Order of Eagles? A. I was. [6]

Q. And in 1940 to September 30th were you the Aerie's physician? A. I was.

(Testimony of Dr. Edward B. Riley.)

The Court: That is September 30th of what year?

Q. (By Mr. Chavelle): September 30th, 1941?

A. That is correct.

Q. From January 1, 1941 to September 30, 1941, were you the Aerie's Physician for Aberdeen Aerie No. 24? A. I was.

Q. And are you at the present time the Aerie Physician? A. I am.

Q. Now, Doctor, can you state whether or not Aberdeen Aerie No. 24 Fraternal Order of Eagles furnishes the equipment that you use to furnish service to the members?

A. Nothing whatever

Q. Do they furnish the medicine which you prescribe? A. No, sir.

Q. Will you state, Doctor, whether or not the membership of Aberdeen Aerie has a prevailing call upon your time?

A. No, sir; they do not.

Q. Are you required by Aberdeen Aerie to give preference to members of the Fraternal Order of Eagles, over your regular patients?

A. No, sir; I am not.

Mr. Winter: I object to it on the ground that it does not appear whether or not the employment is under any contract or whether it is oral. We think it is necessary that that be shown.

Mr. Chavelle: It will be shown, your Honor.

The Court: Objection overruled. Proceed. [7]

(Testimony of Dr. Edward B. Riley.)

Mr. Winter: May I ask a question on voir dire, your Honor?

The Court: I think you can very easily cover this when you take him on cross.

Q. You may answer the question.

A. What is the question?

(Question read.)

A. No, sir.

Q. In rendering medical services to the members of the Fraternal Order of Eagles, where do you generally render that service?

A. In their homes, in my office or at one of the hospitals.

Q. Do you work regularly for Aberdeen Aerie as the Aerie Physician?

A. I render the service to the members that I am called upon to render, in accordance with the constitution.

Q. Are you allowed to engage in other work?

A. Yes, sir.

Q. Do you engage in other work?

A. Yes, sir. My work for the Aberdeen Aerie, Fraternal Order of Eagles is a comparatively small percentage of my general practice.

Q. Are you required to be available at all times, Doctor?

A. No, sir.

Q. Would you state whether or not the Aberdeen Aerie No. 24 directs you in any way as to the manner or method you utilize in treating the members of the Aerie that submit themselves to you for treatment?

(Testimony of Dr. Edward B. Riley.)

A. No, sir; Aberdeen Aerie No. 24 has no jurisdiction [8] or no say or no direction whatever in the way the members are treated by me. These members are treated by me just the same as patients in my private practice.

Q. In other words, you use your own discrimination, Doctor? A. Absolutely.

Q. Are you told how to treat the various members? A. No, sir.

Q. Under the Aerie constitution, are you required to submit reports to the secretary or to the Aerie?

Mr. Winter: We submit, if the Court please, that the constitution is the best evidence of what he is required to do under it.

The Court: That is true, I suppose; but I think we can probably shorten this by letting him finish.

A. I render a report to the secretary or some other officer, usually the secretary. That is, I report the members who become ill and come under my care from time to time. I report the beginning and the termination of their disability.

Q. For what purpose, Doctor?

A. In order that they may draw their weekly sick benefits. That applies, however, only to the members themselves and not to the members of the family, necessarily.

Q. Are you restricted to the type of cases which you shall treat?

A. My services are not required for obstetrical work or anything pertaining thereto, or for venereal

(Testimony of Dr. Edward B. Riley.)

diseases nor chronic diseases which may have existed when the member became a member of the Aerie, nor for any condition resulting [9] from intoxication or violation of law or city ordinances.

Q. What type of cases do you treat, Doctor?

A. All medical cases except the ones that I have stated in the previous answer as exceptions; all minor surgical work; all uncomplicated fractured rib cases; all acute illness involving the member or any member of his family, including children up to 18 years of age, or any person depending upon the member for support; any minor amputating, such as fingers and toes; house calls for ordinary sickness, office calls for ordinary diseases; for illnesses which are not house-confining or hospital patients,—diseases of that nature. In a general way, we are not required to perform major surgery, nor am I required to treat fractures which necessitate the use of X-ray equipment before and after reduction.

Q. Doctor, may you terminate your services at any time? A. I may.

Q. Does Aberdeen Aerie direct you as to what medicines shall be prescribed to individuals you might treat?

A. No, sir; not in any way whatever.

Q. Or as to the method or manner in which you perform your services?

A. No, sir. Those things are all left to my discrimination, just the same as the treatment of patients in private practice.

(Testimony of Dr. Edward B. Riley.)

Q. Do you operate under your own name, Doctor?
A. Yes, sir.

Q. Does Aberdeen Aerie furnish any furniture of telephone service?

A. Nothing whatever. Aberdeen Aerie does not contribute in any way whatever to any of my professional expenses pertaining to equipment or otherwise, not a penny. [10]

Q. Are you directed by Aberdeen Aerie when to perform a minor surgical operation?

A. No, sir.

Q. Is it up to your discrimination whether you shall operate?
A. That is up to my judgment.

Q. Are you elected every year?

A. Yes, sir.

Q. Do you attend meetings?

A. Yes, sir, insofar as possible.

Q. Are you compelled to attend meetings?

A. No, sir.

Q. Is there any penalty involved if you do not attend meetings?
A. No, sir.

Q. Do you ever have occasion to call in an assistant doctor in any of the cases?

A. Well, I have done so, but it hasn't been for a long time.

Q. In the event that you did, who has the appointment, yourself or the Aberdeen Aerie?

A. The patient.

Q. Under the services that you render, has the Aberdeen Aerie power to restrict your territory,

(Testimony of Dr. Edward B. Riley.)

whom you take or what the situation is as to territorial limits?

A. The territory is limited, generally speaking, to the corporate limits of the city of Aberdeen, other than the fact that the little town of Cosmopolis adjoins South Aberdeen, and we have a few members over there, and they are taken care of the same as members in the city of Aberdeen. [11]

Q. Are you required, Doctor, to maintain an assistant in your office? A. No, sir.

Q. Or telephone service? A. No, sir.

Mr. Chavelle: I think that is all, your Honor.

Cross Examination

By Mr. Winter:

Q. You are an officer of the Lodge, are you not, under the constitution? A. I believe so.

Q. And you are so elected?

A. I am elected at the time of the election of the other officers of the Lodge.

Q. And you also attend meetings whenever you can, you say?

A. I usually attend the meetings, yes, sir.

Q. As Aerie physician, you understand you are elected to perform that office entirely under the constitution? Is that right, of the subordinate aerie?

A. Well, naturally, I am guided by the constitution. I use my judgment, of course, too.

Q. In the operations you perform?

A. In performing my professional duties, the same as I would in private practice.

(Testimony of Dr. Edward B. Riley.)

Q. Insofar as any contract you have with the aerie, the terms are prescribed by the constitution? Is that right?

A. No, sir; I wouldn't consider it so.

Q. However, you understand that the aerie can insist that you perform all the duties which are required under the [12] constitution? You understand that?

A. Well, the constitution differentiates between minor surgical work and major surgical work, for example.

Q. I understand, but it also provides what you shall do for the consideration of the 50 cents per member. Isn't that true?

A. Well, the constitution directs, in a way, what is required of the aerie physician.

Q. Yes, but the aerie physician——

A. (Interrupting): As far as these limitation are concerned.

Q. And they couldn't require you to do anything more than what is required in that, if you wanted to insist on the letter of the law, they couldn't insist that you do any more than is provided in the constitution. Is that right?

A. Well, if I did not do what was considered reasonable, as far as the patient was concerned, or the member was concerned, why, I wouldn't feel that I was carrying out my professional duties as a physician.

Q. Under the constitution, you are required to attend all meetings and to make a report of the

(Testimony of Dr. Edward B. Riley.)

sick, or any matter concerning all sick members under your care. Isn't that true? I am referring to Section 7 of article 15.

A. I think there is a statement to that effect in the constitution. However, there are a great many aerie physicians, or fraternal orders, the doctors that voluntarily never attend the meetings. That is entirely optional, as far as that is concerned, as the practice is carried out.

Q. But there is no such provision in the constitution that it is optional, is there? [13]

A. I think the wording possibly reads, "Wherever possible", or words to that effect.

Q. Now, you say that your services as aerie physician may be terminated by a vote of the members. Is that true?

A. The constitution, I think, provides, as I stated before, that if any member has a grievance as far as my services are concerned, he has the privilege of filing a complaint in writing with the worthy president of the aerie, who in turn shall take the grievance up with the officers, at which the aerie physician shall be invited to be present and state the circumstances, and so forth, and in the event that the relief committee or the officers comprising the relief committee, decide that the grievance is a willful grievance, then by vote of the aerie, an aerie physician can be removed from office.

Q. Is that the only cause upon which the aerie physician may be removed? I will put it this way: Isn't it a fact, if the general fund does not work

(Testimony of Dr. Edward B. Riley.)
out, as a matter of fact you can be removed under Section 2, Article 1?

A. Well, if the money isn't there to pay a physician, of course they are not going to elect him.

Q. Well, but after he is elected, if the general fund——

A. (Interrupting): Well, that is so far from professional services,—Well, yes, there is a provision in the constitution to that effect, and that——

Q. (Interrupting): That they can terminate your services?

A. Any man can quit his job if he isn't being paid for it, naturally.

Q. That provides that the Lodge may terminate your services if the general fund does not warrant it? [14]

A. Naturally, they wouldn't do it if they did not have the funds to pay for the services.

Q. You say you maintain your own telephone service? A. I do.

Q. And you maintain office hours?

A. I do.

Q. But isn't it also a fact that under Section 8, Article 15 it provides that the aerie physician shall maintain telephone service and regular office hours and shall advise the secretary accordingly? Did you advise the secretary accordingly?

A. I have no secretary in my office.

Q. I mean the secretary of the Lodge. They have a schedule of your office hours, don't they?

(Testimony of Dr. Edward B. Riley.)

Mr. Chavelle: I object. I think we should have one question at a time here.

Mr. Winter: I will withdraw it. doesn't the Lodge have your telephone number?

A. Why certainly.

Q. And they have your office hours, which you furnish?

A. My telephone number is in the local telephone directory. Everybody has access to it.

Q. And you also furnish the secretary, as you have testified,—You have been there since 1917; but you have in the past furnished them with your office hours personally?

A. Well, all physicians have office hours, naturally, when they are in their office or supposed to be in their office, as far as their work permits them to do that. I can give you one of my cards showing my office hours, the same as I would give it to a private patient. [15]

Q. You have been operating as a physician substantially under the provisions of the constitution, as there provided?

A. Well, I have been serving this office for a period of years past and evidently my services have been satisfactory or I probably wouldn't be in the office today.

Q. Your fees, the fees of the aerie physician, may be changed by the aerie at any time when such requirements conflict with the laws of the committee or for any reason, can't they?

A. On approval, I think, of the grand aerie.

(Testimony of Dr. Edward B. Riley.)

Q. On approval of the grand aerie?

A. The Chief Auditor, and the Chief Auditor of course is an employee of the Grand Aerie.

Q. And also, "When it shall appear to the satisfaction of the Chief Auditor by reason of the rules of any Medical Society or for any other reason it is impossible to secure the services of an Aerie Physician" your services may be dispensed with?

A. Well, that is an inference, as I take it, the question as you ask now. Will you repeat the question, though?

Q. All right. We will withdraw it. You are familiar with Section 18 of Article 15 of the constitution are you not? A. What is it?

Q. Dispensing with Aerie Physician.

A. I am reasonably familiar with the constitution. I can't quote the section verbatim, and I can't state off hand in a general way what the provision is, necessarily.

Q. Well, the provisions for Aerie Physician under the constitution has been substantially the same since you went into the Lodge as Aerie Physician. Isn't that correct? [16]

A. I don't know of any great changes that have been made in recent years.

Q. And you, of course, knew what all of these provisions were when you were elected, didn't you?

A. I knew what it was customary to do.

Q. Now, under the constitution, we have these things provided in the constitution: First, under

(Testimony of Dr. Edward B. Riley.)

the constitution you are required to attend all meetings, to be in good standing——

Mr. Chavelle: I object. He has gone through that and now he is going through that the second time, and I object to it as repetition.

The Court: Wait until he finishes his question.

Q. ——In good standing in the aerie, and to perform minor medical services for that Lodge, are you not?

The Court: I think it is repetition. He was asked questions if he had to attend all meetings, but he may answer anyway.

A. I am supposed, naturally, to attend the meetings within reason. If my evening office hours prevent my attending at the meeting, naturally, I can not be there. If my work or my evening hours prevent me from being there in time, naturally I won't be there. I may be there later in the evening, and I may not be there at all. That depends entirely, of course, upon the work, though.

Q. Exactly. How often do you make reports as to the condition of the sick?

A. I make a verbal report to the secretary when the patient, if he is a member,—If the patient is a member at the time of the incident of his sickness or his disability, [17] because he is going to be entitled to benefits within a certain number of days afterwards, and he is not entitled to benefits until his sickness has been reported to either the secretary or to the Worthy President.

(Testimony of Dr. Edward B. Riley.)

Q. Have your down-town office hours, away from the Lodge, been substantially the same?

A. Ever since I have been in practice, generally speaking.

Q. And you maintain the same office?

A. Indeed, in the same rooms.

Q. Probably the same telephone number?

A. Yes,—Well, I have had my telephone number for—Well, since I have had my own home, which has been twenty-six or -seven years.

Q. Now, your compensation as aerie physician, is that paid directly by the Lodge each quarter?

A. Paid by the Lodge in January, April, July and October, for the previous quarter.

Mr. Chavelle: I object to that as repetition.

Mr. Winter: You may examine.

Re-direct Examination

By Mr. Chavelle:

Q. Doctor, in these reports Mr. Winter referred to, what do they contain? A. Reports?

Q. Reports to the secretary.

A. I inform the secretary as to the name of the member who is ill, or is injured, or who has become disabled, and the date when the disability started.

Q. Does that report consist of how you treat the member [18] or what medicines you give him?

A. None whatever.

Q. Or what services you render?

A. No. I call up the secretary and tell him that John became ill last night, and that is the report.

(Testimony of Dr. Edward B. Riley.)

Q. Referring again to aerie meetings. Are you subject to a penalty if you do not attend these meetings? A. No, sir.

Q. (By the Court): The matter of whether you attend the meetings or do not attend the meetings and what penalties, if any, shall be imposed is left to the local organization? A. Yes, sir.

Q. And any member in good standing who submits himself to you for treatment is entitled to your services, with the exception which you have noted?

A. Providing he is in good standing, as shown by his official receipt, which I am required to ask to see.

Q. But the member is also free to dispense with your services, when he is ill, and select a physician of his own choice?

A. Just the same as a patient in private practice; he can do the same thing, your Honor.

Mr. Chavelle: That is all.

Witness excused.

Mr. Winter: Will you stipulate this is the constitution, if we want to offer it?

Mr. Chavelle: Yes. [19]

WILLIAM OLIVER,

a witness called on behalf of the Plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Will you state your name, please?

A. William Oliver.

Q. Where do you reside?

A. Aberdeen, 309 Congress street.

Q. What is your occupation?

A. Secretary of the Eagles.

Q. What Eagles?

A. Aberdeen Eagles, No. 24.

Q. How long have you served as Secretary of Aberdeen Aerie No. 24, Fraternal Order of Eagles?

A. Twenty years.

Q. Continuously? A. Yes.

Q. Do you have an Aerie Physician?

A. We do.

Q. And who was your Aerie Physician from January of 1928 to January 1, 1931?

A. Dr. Riley.

Q. Is that the doctor who just testified?

A. It is.

Q. Do you know whether Dr. Riley is an established physician in the City of Aberdeen?

A. He is.

Q. And do you know how long Dr. Riley has been the practicing physician in the city of Aberdeen?

A. Well, as long as I can remember—1909 1910.

(Testimony of William Oliver.)

Q. How long has he been, and how is he selected, Mr. Oliver? A. Elected each year.

Q. And is that by the membership?

A. It is.

Q. Can you state whether the membership and the officers of Aberdeen Aerie No. 24 compel the Doctor to attend meetings?

A. No, he is not compelled.

Mr. Winter: I object to that as irrelevant and immaterial. Under the Social Security Act the fact that they do not compel him, if they have the right to, is sufficient. The fact that this witness may testify they don't do it, they don't exercise that right granted by the constitution is immaterial as long as they have the right to do it.

Mr. Chavalle: The law gives the ultimate control——

The Court: Proceed.

Q. (By Mr. Winter): Answer that question, please. How is the aerie physician's compensation fixed, Mr. Oliver?

A. Based upon the membership in good standing.

Q. Who determines that?

A. The secretary.

Q. That is yourself? A. Yes.

Q. Do you have the privilege call upon the Aerie Physician's time? In other words, do you require the Aerie Physician to give preference to your members over his own patients?

A. No, sir.

(Testimony of William Oliver.)

Q. Are any of the Aerie Physician's services performed in your premises? [21] A. No, sir.

Q. Where are they performed?

A. In his office I suppose, mostly.

Q. Is he required to,—the Aerie Physician—required to submit to the Aerie any reports?

A. He does.

Q. And for what purpose?

A. So that the secretary will have a record of those that are sick?

Q. And that report is referred to the Sick Committee or the Visiting Committee? A. It is.

Q. Does the report set out to you in detail what has been done or how it has been done by the Aerie Physician? A. No, it does not.

Q. Do you have any right to direct the Aerie Physician in the treatment of the members who apply to him for services? A. Not me.

Q. Do any of the officers of the Aberdeen Aerie No. 24? A. They do not.

Mr. Winter: I object to that as calling for a concusion. The constitution is the best evidence.

The Court: There is no contention of that kind, is there, Mr. Winter?

Mr. Winter: No contention of what kind?

The Court: That the Lodge or any member of it has a right to direct the physician as to any treatment, or its kind, character, and so forth?

Mr. Winter: No. As far as the physician is concerned, he uses his best judgment. [22]

Mr. Chavelle: You agree to that?

(Testimony of William Oliver.)

Mr. Winter: Oh, yes.

Q. (By Mr. Chavelle): Mr. Oliver, will you state how you may discharge an erring physician, what procedure is involved, if any?

A. Well, I have forgotten. In Aberdeen, we don't have no complaints; but if we did have complaints, it would have to be brought in to the Worthy President by a complaint, and the Worthy President would appoint a grievance committee, a trial committee, and it would be tried before that trial committee.

Q. (By the Court): Well, you proceed with the discharge of your position the same as you would with any other officer of the organization?

A. Oh, yes.

Q. There is no difference, is there?

A. No.

Q. (By Mr. Chavelle): Do you contribute to the overhead of the doctor's office?

A. No, sir.

Mr. Winter: Does he pay his dues?

(No answer.)

Q. (By Mr. Chavelle): Do you require that the physician is available at all times?

A. No, sir.

Q. Do you furnish the medicine? Or does the doctor furnish the medicine?

A. Paid for by the individuals, I believe.

Mr. Winter: We don't contend the Lodge actually furnishes any medicine or surgical instruments, except as to what in- [23] struments he

(Testimony of William Oliver.)

might purchase out of the \$.50 per member that he is paid.

Q. (By Mr. Chavelle): Do you require, at the Aberdeen Aerie, to maintain an assistant in his office?

A. No, sir.

Q. Does he maintain an assistant?

A. Not to my knowledge.

Q. Has he at any time maintained an assistant?

A. No, not to my knowledge.

Mr. Chavelle: You have no objection to the introduction of this list covering the pay involved from Aberdeen Aerie?

Mr. Winter: No.

Mr. Chavelle: At this time I will offer that in evidence, then.

The Court: It will be admitted in evidence.

Statement of pay received admitted in evidence and marked Plaintiff's Exhibit 1.

Mr. Winter: May I ask one question?

Mr. Chavelle: Yes.

Q. (By Mr. Winter): Showing you what has been marked as plaintiff's exhibit 1, that statement was prepared by you, was it?

A. Yes.

Q. (By Mr. Winter): Showing you what has been marked as plaintiff's exhibit 1, that statement was prepared by you, you say, and shows the amount which has been paid by you to the various people connected with the Aerie during the period therein shown, here in issue?

A. Yes, sir.

(Testimony of William Oliver.)

Q. These do not show the amount which was paid to you as Secretary? A. Paid to me?

Q. Yes. A. No, sir.

Q. (By the Court): Well, was the Secretary involved?

Mr. Winter: He was not involved. They said he was an employee. Isn't that true?

Mr. Chavelle: That is correct.

The Court: We will now adjourn until 1:45 p. m.

(Noon adjournment.)

Q. (By Mr. Chavelle): Does the Aerie Physician render any other service to your aerie, outside of medical service? I am referring particularly to the period involved. A. He does not.

Q. Do you know whether Aberdeen Aerie No. 24 in the years 1928, 1929 and to September 30, 1941, paid a Federal Income Tax?

A. It did not.

Mr. Winter: I object to that as irrelevant and immaterial and not an issue in this case, and I ask that the answer be stricken.

The Court: It does not meet the question that it is being tried to the Court. If it is not relevant or material, the Court will not consider it.

Mr. Winter: We have no objection to this document presented by counsel.

Mr. Chavelle: I want to offer the claim for refund in evidence.

The Court: That will be admitted, then, there being no objection. [25]

(Testimony of William Oliver.)

Claims for refund admitted in evidence and marked Plaintiff's Exhibits Nos. 2, 3, 4, and 5.

Q. (By Mr. Chavelle): Now, during the year 1938, Mr. Oliver, did you or your aerie have a Worthy President? A. Yes, sir.

Q. Did you list him as one of your employees for that period, 1938?

A. I did, after I found out that we were subject to pay this tax.

Q. What was his name in 1938?

A. Well now,—

Q. (By Mr. Winter): Was his name and the compensation he was paid at that time listed on this exhibit?

A. It would be pretty hard for me to remember that far back, that number of years.

Q. (By Mr. Chavelle): Was his name Vernon Bagley? Do you know? A. Yes.

Q. What compensation did he receive during that time from Aberdeen Aerie No. 24?

A. One dollar a year.

Q. How was that compensation fixed? How did you determine what the Worthy President should receive?

A. It is in the constitution that the Subordinate Aerie may pay him, and you have it in your By-Laws of each Subordinate Aerie.

Q. What are the duties, generally, of the Worthy President?

Mr. Winter: Do you mean as provided by the constitution? [26]

(Testimony of William Oliver.)

Mr. Chavelle: As provided by the constitution, and the matter of practice.

Mr. Winter: We submit the constitution is the best evidence.

The Court: I think that doubtless covers that. It is unnecessary.

Q. (By Mr. Chavelle): Are his duties of a ritualistic nature?

Mr. Winter: I object to that as calling for a conclusion of the witness on an issue that may be for the Court to determine, and not for this witness.

The Court: I think that might even be admitted, that this is a fraternal organization.

Mr. Winter: We admit it is a fraternal organization, but we do not admit that his duties are entirely ritualistic. He is still an officer of the corporation, of a fraternal organization.

The Court: This witness may answer. Of course it is just a conclusion of this witness. I take it for all practical purposes in this trial it is admitted that this is a fraternal organization?

Mr. Winter: Yes, your Honor.

Q. (By Mr. Chavelle): Mr. Oliver, does that purport to be the constitution of a subordinate aerie, under which you operate? A. It is.

Mr. Winter: I have no objections.

Mr. Chavelle: I offer it in evidence, your Honor.

The Court: It may be admitted.

The constitution admitted in evidence and marked Plaintiff's Exhibit 6. [27]

(Testimony of William Oliver.)

Q. (By Mr. Chavelle): How do you select your Worthy President?

Mr. Winter: I object to that. The constitution speaks for itself.

The Court: I think that is true, Mr. Chavelle.

Mr. Chavelle: All right, your Honor.

Q. During this period of time, Mr. Oliver, did you have a Worthy Vice-President by the name of O. I. Tucker, in 1938?

A. We did for a part of the term.

Q. And what compensation did he receive?

A. A dollar a quarter.

Q. And his duties are governed by the constitution? A. Yes, sir.

Q. Referring to plaintiff's exhibit 6?

A. Yes, sir.

Q. During that period of time did you have in your employ a Treasurer, 1938? A. Yes, sir.

Q. And was his name J. P. Bullington?

A. Yes, sir.

Q. What compensation did he receive?

A. \$5.00 a month.

Q. And during this period of 1938, did you have a conductor in your aerie? A. Yes, sir.

Q. What compensation did he receive?

A. \$1.00 a month.

Mr. Winter: We want the record to show, if the Court please, that we are objecting to these questions and answers and ask that they be stricken on the ground that there is no [28] allegation in

(Testimony of William Oliver.)

the complaint, claiming *and* refund for taxes with respect to the conductor.

Mr. Chavelle: If the Court pleases, that is a claim for refund in the statement, form SS-1-C.

(No ruling.)

Q. (By Mr. Chavelle): Who was your conductor at that time? A. What year was that?

Q. 1938. Was it J. P. (Dick) Foley?

A. I believe it was.

Mr. Chavelle: We filed a claim for refund, and in the complaint it is set forth.

(Extensive argument.)

The Court: I think I shall overrule the objection and allow him to answer.

Q. (By Mr. Chavelle): What compensation did you say the Conductor received during 1938?

A. \$1.00 a month.

Q. Did you also have trustees during the period of 1938? A. Yes, sir.

Q. Three trustees or more? A. Three.

Q. And their names were Curtis, Merritt and Heintz. Is that correct? A. Yes.

Q. What compensation did they receive?

A. One dollar a quarter.

Q. How was their compensation fixed?

A. By the constitution, the same as the others, and had it inserted in their By-Laws. [29]

Q. And their duties are outlined in the constitution, referring to plaintiff's exhibit No. 6?

A. Yes, sir.

(Testimony of William Oliver.)

Q. Did you also have during the year 1938 an auditing committee? A. Yes, sir.

Q. How many members of the auditing committee are there? A. Three.

Q. How are they selected?

A. The Worthy President appoints them.

Q. The Worthy President appoints them?

A. Yes.

Q. Is that provided for in the constitution?

A. Yes.

Q. What compensation do they receive?

A. One dollar a month each.

Q. For what period of time do they serve?

A. If they fill out their full term, it is yearly.

Q. And are their duties also set forth in the constitution? A. They are.

Q. Now, I will ask you whether or not the treasurer is regularly employed by you?

A. By the Lodge.

Q. Does he devote his entire time to your aerie?

A. No.

Q. Is he employed elsewhere? A. He is.

Q. During the time in question was he employed elsewhere? A. He was. [30]

Q. Does he perform the services on your premises or off of your premises?

A. Well, the treasurer comes to the secretary's office and gets the money and takes it to the bank and deposits it.

Q. Does he make a treasurer's report?

A. He does.

(Testimony of William Oliver.)

Q. Does he do that under his own direction or your direction? A. His own direction.

Q. (By the Court): What did you say the compensation of the treasurer was?

A. \$5.00 a month.

Q. (By Mr. Chavelle): Is that fixed by the constitution?

A. No, I don't think it is. You have to insert that in your By-Laws.

Q. Now, calling your attention to the conductor, in plaintiff's exhibit 6 at page 35, article 17, entitled "Duties of the Worthy Conductor." I will read a portion of that and ask you if that represents the duties he performs? A. Yes, sir.

Q. "Shall satisfy himself that all persons who are present at the time of any session are entitled to remain. No member or visitor shall be permitted at a meeting unless his dues shall have been paid in advance." A. It is.

Q. And does he also have to do with visitors, as therein provided? A. Yes, sir.

Q. And where is that done? In the aerie room or outside?

A. In the aerie room. The visitors are introduced before [31] they start, at the altar.

Q. Does he attend your meetings?

A. Yes, sir.

Q. How often do you have meetings?

A. We have meetings every week, every Friday.

Q. Now, referring to section 4, "Custody of Property". Does he have custody of property?

(Testimony of William Oliver.)

A. Yes, sir.

Q. What properties are they referring to?

A. The regalias and flags and banners which are placed in the aerie room and what stuff is in the aerie room, whatever it may be.

Q. You speak about regalia. Is that something the officers wear? A. Yes.

Q. Section 5, "Disposition of the property". It reads:—

Mr. Winter: That is in evidence. I don't *think* you need to go into detail to that extent, to read it. I think with the exhibit in evidence and the general question asked him as to whether or not the conductor performs the various duties set forth in the constitution and By-Laws and what his compensation in that regard is, would be sufficient.

The Court: Yes.

Q. (By Mr. Chavelle): I will ask you about this article 17, "Duties of the Worthy Conductor" in plaintiff's exhibit 6, I will ask you if that purports to be the duties that he performed for your aerie during the period of 1938? A. It is.

Q. What was that compensation, again?

A. Additional \$1.00 a month. [32]

Q. Is it customary that the President, Vice-President, Treasurer, Trustees, Conductor and the Auditing Committee are generally employed elsewhere? A. Every one, I understand, are.

Q. How often do they come to your aerie home?

A. The officers?

(Testimony of William Oliver.)

Q. Yes.

A. That is pretty hard to say. Our officers are all alternatives.

Q. Is it their general practice to all be there on meeting nights, which you have stated are Friday nights? A. It is.

Q. (By the Court): Do their duties require them to be there at other times?

A. Yes. At times the auditing committee has to be.

Q. (By Mr. Chavelle): Are substantially a majority of their duties performed in the aerie room?

A. They are.

Q. Is the President and the Vice-President required to consent to the——

Mr. Winter: Just a minute! I object to that as irrelevant and immaterial, and the fact is shown here, the requirements and what they have to do are embodied in the constitution.

The Court: I do not suppose the Government is contending here that these people do not perform the duties that were required of them by the ritual of the order?

Mr. Winter: No. We admit that. That is the reason we think the constitution is the best evidence of what they have to do. I think we will concede that they have to—— [33]

Q. (By Mr. Chavelle): I will ask you, Mr. Oliver, in 1939 did the President, Vice-President, Treasurer, the Conductor, Trustees and Auditing

(Testimony of William Oliver.)

Committee receive the same compensation as they did in 1938?

Mr. Winter: We will object to that on the ground that he is asking about the Vice-President. His complaint alleges that they are seeking a refund of the moneys paid and consequently it is,—whatever their claim for refund, it makes no such allegation.

The Court has no jurisdiction to hear anything with respect to any claim made in the complaint and not made in the claim for refund.

The Court: Of course that is a fact we will have to pass upon ultimately, as a matter of law. He may answer this question.

A. You mean the salary is changed or not changed?

Q. (By Mr. Chavelle): I am asking you whether it is the same or not? A. The same.

Q. (By the Court): And the duties were the same? A. Yes.

Q. (By Mr. Chavelle): The duties were the same? A. Yes.

Q. (By the Court): That is the same as 1938?

A. Yes.

Q. (By Mr. Chavelle): The duties in 1939 of all of these officers was the same as 1938. Is that correct? A. It is.

Q. Now, do you know whether or not in 1940, whether you paid any tax upon the President, Vice-President, Treasurer, [34] Conductor or the Trustees or the Auditing Committee?

(Testimony of William Oliver.)

Mr. Winter: I object to that as incompetent, irrelevant and immaterial. Now, as far as the record shows, no claim for refund has been filed with respect to these individuals. That is definite and certain and was agreed to by Mr. Chavelle. He said that he conceded that the President, Vice-President, Secretary, Treasurer, Conductor were individuals——

Mr. Chavelle: I agree to that. I will let it be stricken.

Q. In 1940 you paid an Aerie Physician. Is that correct? A. Yes, sir.

Q. And under Title VIII of the Social Security Act, did you file a claim for refund of the amount paid? A. Yes.

Mr. Winter: The claims are admitted in evidence.

The Witness: Yes, we did.

Q. (By Mr. Chavelle): And the same is true of January 1, 1941 through September 30, 1941? Is that correct? A. It is.

Q. (By the Court): Now, in 1940 the amendment was passed, was it not?

Mr. Chavelle: Yes. That is admitted by counsel, in 1941.

Mr. Winter: The fact no tax was assessed and no claim was filed shows that. While the complaint includes refunds on two physicians, counsel also stipulated before he had the report that only one was involved, and the amount of compensation is shown in plaintiff's exhibit 1.

(Testimony of William Oliver.)

Mr. Chavelle: That is correct. That is agreeable. That is all.

Cross Examination

By Mr. Winter: [35]

Q. I take it, Mr. Oliver, the constitution, then, provides for all the duties of the physician, president, vice-president, treasurer, conductor, financial trustee and auditing committee. Is that right?

A. Provides for their duties?

Q. Yes, what duties that are required of them to perform.

A. Yes.

Q. And is it a fact during the period here involved they did perform those duties?

Mr. Chavelle: Do you understand the question, Mr. Oliver?

A. Yes.

Q. (By Mr. Winter): Under the constitution there are one or two things I want to find out. Under the constitution the treasurer is responsible for all finances of the Lodge?

A. He is after he gives me a receipt.

Q. And makes financial reports to the Lodge?

A. Yes.

Q. At the regular meetings of the Lodge?

A. Yes.

Q. He is required to and does he keep monthly accounts and annual financial reports. Is that a fact?

Mr. Chavelle: I object to that as not the best evidence. The best evidence is the constitution, and it sets forth his duties. He answered the first ques-

(Testimony of William Oliver.)

tion that this particular individual as to whom he is testifying carried on the duties as set forth in the constitution. Now, counsel goes into the particular section of the constitution. It is repetition.

The Court: It is repetition, but he may answer.

(Question read.)

A. Yes, sir. [36]

Q. Now, I take it these salaries which you say were paid, these amounts which were paid these various individuals, were either provided by the constitution or the By-Laws of the Lodge?

A. Yes, sir.

Q. And they were actually paid?

A. Yes, sir.

Q. And you were the secretary?

A. Yes, sir.

Q. You are paid a salary, are you?

Mr. Chavelle: I object to that. There is no issue of the secretary involved in this case. It is immaterial and irrelevant.

The Court: He may answer.

Q. (By Mr. Winter): You are paid a salary?

A. Yes, sir.

The Court: I understand that is not in issue at all.

Q. (By Mr. Winter): Is that fixed by the constitution?

Mr. Chavelle: I object as not in issue here.

Mr. Winter: It is not in issue except as preliminary to a later question.

(Testimony of William Oliver.):

The Court: Proceed.

Q. (By Mr. Winter): Is the salary fixed? Is that fixed by the constitution or the Lodge?

A. By the By-Laws.

Q. By the By-Laws? A. Yes.

Q. I assume that the treasurer's salary is fixed by the By-Laws? A. Yes. [37]

Q. Do you have any other employees or individuals paid wages or—When we are talking about salaries, I do not mean by that—paid compensation which you allege in your complaint, other than those shown on this exhibit 1, which you filed, and yourself?

A. Why, my name isn't on that.

Q. I mean except yourself?

A. And the janitor and Riley's.

Q. Is Riley's in here?

A. Riley isn't in there—Yes, it is.

Q. Dr. Riley? A. Yes.

Q. He is the physician?

A. Yes. I don't think there is any.

Q. I think you testified that Mr. Riley's compensation was based upon the membership?

A. In good standing.

Q. And you determine that, do you?

A. I do.

Q. And discuss it with the other officers?

A. No.

Q. Mr. Riley is an officer of the Lodge?

A. Yes, sir.

The Court: Dr. Riley?

(Testimony of William Oliver.)

Mr. Winter: Yes. He is an officer of the Lodge?

A. Yes.

Q. And that is reported to the treasurer, the amount due him is reported to the treasurer by you. Is that so?

A. I make the check out.

Q. Yourself? [38]

A. Myself.

Q. And have the president sign it, do you?

A. Yes.

Q. Who else signs the check?

A. The treasurer.

Q. Who else?

A. The president, the treasurer and secretary.

Q. That is all provided in the constitution?

A. Yes.

Q. That is part of the regular duties, is it?

A. Yes.

Redirect Examination

By Mr. Chavelle:

Q. The doctor only renders services, medical services, and no other services in his capacity as a physician. Is that correct?

A. That is all.

Q. Has he anything to do with the policy of the Aerie?

A. None whatever.

Q. Has he, however, anything to do with the business affairs of the Aerie?

A. No more than any other member.

The Court: I want to ask you for my own information. Tell me again, what is the compensation of the president, a year?

A. One dollar a quarter; \$4.00 a year.

(Testimony of William Oliver.)

Q. What is the compensation of the Vice-President? A. Four dollars a year.

Q. And the treasurer?

A. Five dollars a month, \$60.00 a year. [39]

Q. And the conductor?

A. One dollar a month.

Q. Twelve dollars a year? A. Yes.

Q. And the trustees?

A. One dollar a quarter. There are three of them. Each gets that.

Q. Four dollars a year? A. Yes.

Q. And the auditing committee, one dollar a month each? A. Yes.

Q. How many of these? A. Three.

Q. That, apparently, includes the whole list?

A. Yes.

Mr. Chavelle: That is all.

Witness excused.

Mr. Chavelle: That is our case. With the court's and counsel's permission, I would like to re-open the case for the purpose of one more exhibit to be introduced in evidence.

The Court: Without objection, it may be admitted.

Mr. Chavelle: I now offer plaintiff's exhibit 7.

Mr. Winter: No objection.

The Court: Admitted.

The document admitted in evidence and marked Plaintiff's Exhibit 7.

Mr. Chavelle: The plaintiff rests.

Mr. Winter: The defendant rests, your Honor.

The Court: I would be glad to hear from you first, Mr. [40] Chavelle.

Mr. Chavelle: I have one suggestion and I might propose it to you. The Ballard case will also be tried, and it involves the same issues. It is under title 9 of the Social Security Act, rather than title 8, and in that case there is involved the Aerie Physician and ritualistic officers.

The Court: What features of 9 distinguish it from 8?

Mr. Chavelle: There is no real feature except title 8. It is the Federal Contributions Act, which is known as the Social Security, and title 9 is correctly known as the Federal Unemployment Compensation Act. One is social security and the other is employment compensation.

And in the Ballard case title 9 is involved. However, the physician is involved, as are the ritualistic officers, and I thought perhaps it would be better to try that case, and then I will make a complete argument.

The Court: Very well. You may proceed to make your record in that case.

[Endorsed]: Filed Jan. 29, 1944. [41]

In the District Court of the United States for the
Western District of Washington
Southern Division

Civil Action

No. 466

SEATTLE AERIE No. 1 of the FRATERNAL
ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue
of the United States of America,
Defendant.

Civil Action

No. 510

BALLARD AERIE No. 172 of the FRATERNAL
ORDER OF EAGLES, a corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

Be It Remembered, That this cause came regularly on for hearing before the Hon. Charles H. Leavy, Judge of the above-entitled court, at Tacoma, Washington, on May 25, 1943.

Appearances:

For the Plaintiff,

Mr. Cornelius Chavelle of Messrs. Chavelle
& Chavelle.

For the Defendant,

Mr. Thomas R. Winter, Special Assistant
to the Chief Counsel.

Both sides having announced themselves ready for trial, the following proceedings were had: [3*]

Mr. Winter: I think we should have a stipulation.

It is stipulated that the Court may consider the same evidence, insofar as material, which was introduced in the Aberdeen case, as being considered introduced in this case.

The Court: Yes.

Mr. Winter: Now, in reference to these exhibits, the constitution and the testimony with respect to the physician and other individuals involved.

The Court: Very well.

Mr. Winter: With respect to the Ballard case, we have a stipulation.

Mr. Chavelle: If the Court please, if it is agreeable to the Court, as it has been agreeable to counsel, we will now commence with the case of Seattle Aerie No. 1, Fraternal Order of Eagles vs. Clark Squire, Collector of Internal Revenue of the United States of America.

At this time, if *it agreeable* that we go ahead

*Page numbering appearing at foot of page of original Reporter's Transcript.

with this case, I will make a brief statement for the Court.

The Court: Very well.

Mr. Chavelle: In this case, your Honor, there is involved under title IX of the Social Security Act, commonly called the Federal Unemployment Act, the question of whether or not certain members of the orchestra which performed for the Plaintiff, that is performs at a periodic dance, are employees of the Plaintiff or are employees of the leader of that orchestra.

The evidence will show that——

The Court: Now, is there a new question involved here?

Mr. Chavelle: Only the musicians.

The Court: In Seattle? [4]

Mr. Chavelle: In Seattle, yes, only the musicians. The record will show that——

The Court: Let me ask you: Was there any difference in levying the assessment for tax collection in the Seattle case over that of the others? Or was there no claim made or no protest filed?

Mr. Chavelle: The situation is, your Honor, that Seattle Aerie No. 1 has never been assessed as to the ritualistic officers or physicians. It has been overlooked by the Government, and the only question we have there is as to the **musicians**.

Mr. Winter: I didn't know that. All I know is what was involved in this case, and what claims have been filed with me. Apparently the Seattle Aerie has five or six physicians; and, further than that, they come under title IX because they have 8

or more employees, because they have a big social room where they have a lot of employees. The Ballard Aerie, in which they have 8 or more, too, come under title IX.

That which is involved in the Seattle case is because they have more than 9.

The Court: The Court is endeavoring to ascertain if the officers were assessed in that aerie the same as the one we just heard.

Mr. Chavelle: Throughout the state of Washington there is a great discrimination. Some aeries they do, and others they do not. In the case of Seattle Aerie No. 1, which is large, with a membership of 14,000, they have never assessed the physician. The ritualistic officers——

Mr. Winter: Of course, your Honor, I will give the Court [5] the real reason why there might be a discrepancy is because of the 1940 Act. Ritualistic officers, of course, would not be assessible, and in all probability they did not get the assessments in when the 1930 figures came in, they didn't go back and assess them before the statute of limitations expired or the claim for refund are still pending, I don't know. In any event, I have no definite knowledge. If counsel says that is the fact, it may be true. We don't get around to all taxpayers at the same time. These cases, while involving an insignificant amount of money—Not insignificant—but a small amount of money, may be very trifling, compared with 1700 aeries in the United States:

The Court: Is it a question of first impression,

as far as these others are concerned? Have these questions never been passed upon?

Mr. Winter: Never been passed upon, whether aerie physicians, physicians for any fraternal orders, were considered employees, or whether ritualistic officers are taxed, has never been determined by any Federal Court. And the same is true of musicians. To that extent, it has not been determined whether or not musicians who play for fraternal orders are taxed as employees. The question has been decided in a hotel and restaurant case, but not in a fraternal order.

J. M. HOOPER,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Will you state your full name, please? [6]

A. J. M. Hooper.

Q. Where do you reside?

A. 4014 First Avenue Northeast, Seattle.

Q. And are you a member of the Fraternal Order of Eagles? A. I am.

Q. What aerie? A. Seattle Aerie No. 1.

Q. How long have you been a member of the Eagles? A. Since 1917.

Q. Have you ever held any state office?

A. Yes, I was state president three years ago.

(Testimony of J. M. Hooper.)

Q. Have you ever been an officer of Seattle Aerie No. 1?

A. Past President of Seattle Aerie No. 1.

Q. What is your present connection with Seattle Aerie No. 1?

A. I am one of the members of the Board of Trustees.

Q. Now, I will ask you, Mr. Hooper, whether or not in 1936 Seattle Aerie No. 1 held dances?

A. They did.

Q. And under whose direction were those dances arranged?

A. They were under my charge.

Q. Were you the Chairman of the committee for the purpose of sponsoring those dances?

A. I was placed in charge with the other two members of the Board.

Q. What was your official title, if any?

A. Manager.

Q. Now, I will ask you to state whether any dances were held by Seattle Aerie No. 1?

A. They were held every Saturday night. [7]

Q. Every Saturday night during the year 1936?

A. Yes, sir.

Q. And where were these dance halls?

A. In the Eagles Auditorium, Seattle, now called the Senator Auditorium.

Q. In your own building?

A. That is our own building.

Q. Did you hire the orchestra?

A. I did not.

(Testimony of J. M. Hooper.)

Q. Did you contact the leader?

A. The leader contacted me when he found out we were going to open a dance.

Q. During the year 1936, did you have the same orchestra play for you?

A. The same orchestra.

Q. And what was the name of the leader? What was the name of the leader of that orchestra during 1936?

A. Bill Winder.

Q. Did he operate under any trade name?

A. He called his orchestra "The Senators."

Q. What was his orchestra advertised as then?

A. It was advertised as "The Senators."

Q. How did you arrange for the appearance of Bill Winder and "The Senators"?

A. The arrangement was made two years before, 1934.

Q. To clarify this, possibly, is it true that you were sponsoring dances prior to 1936?

A. Yes, started in 1934.

Q. Will you explain what arrangements you made in order to secure the services of Bill Winder's Senators? [8]

A. He found out we were going to open a dance and he came up to me and wanted to put his orchestra on those dances, and I took it up with the members of the Board of Trustees as to the Senators, and they authorized me to go ahead and have Mr. Winder put his orchestra in.

Q. In that connection, did you have a written contract with Mr. Winder, or an oral contract?

(Testimony of J. M. Hooper.)

A. Oral agreement.

Q. Now, during the year 1937 do you recall what orchestra played at your dances?

A. Bill Winder's Senators.

Q. During the year 1938 do you recall what orchestra played at your dances?

A. Bill Winder and the Senators.

Q. During 1939 do you recall what orchestra played at your dances?

A. Bill Winder and his Senators.

Q. During the years 1936, 1937, 1938 and 1939 how often did you hold those dances?

A. Every Saturday night.

Q. Did you come to an arrangement as to the organization, so far as the services rendered by Bill Winder's orchestra each Saturday night?

A. All we told him was that we wanted the minimum number of men for a hall of that kind.

Q. Did you, as far as the payment of the orchestra's services were concerned, were you in contact with him? Or were you in contact with the individual members of the organization?

A. With him entirely.

Q. After the orchestra performed their services for you, [9] who was paid? The leader? or the individual members of the orchestra?

Q. Do you know whether or not the leader paid the individual members of the orchestra?

A. I do not.

Q. Did you pay them?

A. I did not.

(Testimony of J. M. Hooper.)

Q. Did the members ever ask you about paying them?
A. The individual members?

Q. The individual members of the orchestra?

A. No, they did not.

Q. Approximately at what hour would these dances start on Saturday night?

A. Started at nine o'clock and closed at 12:30.

Q. Was it understood before Bill Winder entered into this agreement to render services for you that the orchestra would start at nine o'clock?

A. That was the understanding when we first started in, because on Saturday night the dances run three and a half hours, and during the week they run three hours.

Q. Did you have any discussion with Mr. Winder as to the type of music to be played at those dances?

A. No, he made his own arrangement as to the music. We had nothing to do with it.

Q. Did you furnish the music?

A. Furnish the music?

Q. Who did furnish the music?

A. I suppose Mr. Winder did.

Q. Do you know who set the intermissions, if any?
A. Mr. Winder.

Q. Did you have intermissions? [10]

A. We had intermissions.

Q. Did you have the right to discharge any individual member of the orchestra?

Mr. Winter: I object to that as calling for a

(Testimony of J. M. Hooper.)

conclusion. He can set forth what his contract was, if he claims it was a contract, independent contract.

The Court: I think he may answer.

A. We had nothing to do with any orchestra, nor had any authority over him whatsoever.

Q. Did you have a separate contract?

Mr. Winter: That does call for a conclusion. Now, as he was the agent of the Union to secure the services of the musicians and he thought he had a right under the authority given him by Seattle Aerie No. 1, he had the right to discharge any musician.

Q. (By Mr. Chavelle): I will ask you to answer the question? A. I had no right.

Q. Was the control of the dances under your exclusive control? A. They were.

Q. So designated by Seattle Aerie No. 1. Is that correct?

A. At the direction of the Board of Trustees.

Q. Did you ever have occasion to have any discussion with any of the individual members of the orchestra during the period of 1936, 1937, 1938 and 1939? A. I did not.

Q. Did you ever come into contact with any individual member of the orchestra?

A. Just to speak to them. I didn't even know their [11] names.

Q. Were they paid on a monthly basis or weekly basis or on performance?

A. Performance. That is every Saturday night was each performance.

(Testimony of J. M. Hooper.)

Q. Did you or Seattle Aerie No. 1 supply the instruments which were used?

A. No, we did not.

Q. Did this orchestra which played for Seattle Aerie No. 1 at their dances during 1936, 1937, 1938 and 1939 have any designation as to their name?

A. They called themselves "The Senators," "Bill Winders and his Senators."

Q. Was there any identification on their music stands?

A. They had a letter "S" on their music stands.

Q. Is it true at all times during 1936, 1937, 1938 and 1939 he operated under that name?

A. That is right.

Q. At all dances?

A. As far as I know.

Q. As far as your dances were concerned?

A. As far as our dances, and I don't know whether they played at any other place or not.

Q. Directing your attention to what purports to be Plaintiff's Exhibit No. 1, did you prepare this sign?

A. We had the painter paint this sign, yes.

Q. During the period 1936, 1937, 1938 and 1939 did you use this sign?

A. That and one similar.

Mr. Chavelle: I will offer that in evidence. [12]

Mr. Winter: We have no objection.

Mr. Chavelle: I wonder if we can stipulate, so far as the record is concerned, so we won't have to have it—I wonder if we can not stipulate it ap-

(Testimony of J. M. Hooper.)

pears to be a paper or a card sign about four feet by three feet, background with black and red letters, worded "Senator Auditorium Ball Room," in large printed letters; "Dance with Bill Winder and his Senators."

Mr. Winter: We will so stipulate.

The Court: Yes.

Mr. Winter: I understand you to say the red space the same.

The Court: It will be admitted in evidence for the purpose of the record.

(The sign admitted in evidence and marked Plaintiff's Exhibit 1.)

The Court: For the purpose of the record, the printing such as has been suggested by the stipulation may be used in place of the exhibit.

Mr. Chavelle: Yes, that is correct.

Q. I will ask you for what purpose you had that sign made?

A. To place in the lobby of the dance hall.

Q. Referring to plaintiff's exhibit 1?

A. Yes.

Q. And did you have similar signs upon the premises during the time that Bill Winder played for you as you have testified in 1936, 1937, 1938 and 1939?

A. We had similar signs, yes.

Q. Did you ever have occasion to advertise Bill Winder's orchestra in any periodical? [13]

A. We advertised from time to time in the daily papers.

(Testimony of J. M. Hooper.)

Q. And what reference was made to the orchestra that was performing during 1936, at that time?

A. We used the same name as we used on the card over there, at all times.

Q. The same as plaintiff's exhibit 1?

A. That is right.

Q. Did you furnish the individual sheet music that was used by the orchestra?

A. We furnished no music.

Q. Who procured the individual members of the orchestra in question, that is Bill Winder's orchestra, which played for you as testified in 1936 to 1939, inclusive?

A. I presume Mr. Winder; he was the leader.

Q. Were you in attendance at all of these dances?

A. I was with the exception of two or three in six years.

Q. Will you state whether or not the individual members of the orchestra that appeared in 1936 also were in the orchestra in 1937?

A. Well, as I remember it, it was pretty well the same. There were a few changes, but a very few.

Q. But you did recognize over this period of time involved, 1936 to 1939, inclusive, that the orchestra was of a permanent organization?

A. Yes, sir.

Mr. Winter: I object to what he understood as calling for a conclusion.

(Testimony of J. M. Hooper.)

Q. (By Mr. Chavelle): Well, was it a permanent organization? [14]

Mr. Winter: I object as calling for a conclusion of this witness.

The Court: I think I will sustain the objection.

Q. (By Mr. Chavelle): Now, will you state whether or not Bill Winder and his Senators played during the year 1939 throughout 1939?

A. They did.

Q. Did you conduct these dances in 1940?

A. I did.

Q. And at what intervals were the dances held?

A. Every Saturday night.

Q. And where were they held?

A. In the Senator Auditorium Ball Room.

Q. Will you state whether or not the Senator Auditorium is a part of your building?

A. It is a part of our building.

Q. And during 1940, who did you have as the orchestra?

A. Well, there was a change about that time. I don't know the exact date.

Q. Well, approximately when was the change made?

A. About five and a half years, as I remember it, Bill Winder was released and we hired Arden Stevens.

Q. You say you hired Arden Stevens?

A. Arden Stevens. He was the director. He wanted to put a director in there and we hired him.

(Testimony of J. M. Hooper.)

Q. Did he operate under any name or what?

A. He called his orchestra the "Commodores."

Q. For what period of time did Arden Stevens and his Commodores play there?

A. I don't remember exactly,—a year or a little over [15] a year, and he went into service.

Q. During the year 1940 did he play for you?

A. I think that is it.

Q. Now, subsequent to 1940, during 1941, who played for you? Do you recall?

A. The orchestra was then taken over by Ken Cloud. He was the leader.

Q. Did he operate under any name?

A. He took over the orchestra as "The Commodores," as it was named before.

Q. That was in 1941?

A. 1940 and 1941, these two boys were in there. It might have been the last part of 1939.

Q. Let me ask you this, Mr. Hooper, concerning the arrangement made for the services of Arden Stevens and his Commodores, and Kenneth Cloud and his Commodores? Did you have a similar arrangement as you did with Bill Winder?

A. We did.

Q. Was it verbal or a written agreement?

A. Verbal.

Q. Did you have any dealings with the Musicians Union in obtaining the services of this orchestra?

A. None at all.

Q. Nor any during 1936, 1937, 1938, 1939, 1940

(Testimony of J. M. Hooper.)

and 1941, did you have any dealings with the Union in obtaining this orchestra?

A. No dealings whatever.

Q. I am referring to the Musicians Union.

A. Yes.

Q. I am asking you, Mr. Hooper, after Bill Winder's [16] services were concluded, which was the early part of 1940, as you have testified, whether or not you paid the individual members of Arden Stevens' orchestra or Kenneth Cloud's orchestra? or did you pay the leader?

A. I paid the leader at all times.

Q. Did you have occasion at any time during the period of 1936 to 1941 inclusive to discharge any individual members of that orchestra?

A. No, because we had nothing to do with them.

Q. Did you have any right to discharge them?

A. We had no right to discharge them.

Mr. Winter: I object to that as calling for a conclusion. The agreement is the best evidence. I don't know what the agreement was as yet.

Q. (By Mr. Winter): You say you had an oral agreement. Was that agreement for the period——

The Court: You will have an opportunity to cross examine him on that.

Q. (By Mr. Chavelle): When you approached these individual orchestra leaders, did you approach them for the purpose of obtaining an orchestra?

A. They approached me.

(Testimony of J. M. Hooper.)

Mr. Winter: We object to the question being leading. He can tell us what he did.

The Court: I think I shall sustain that objection, unless this situation is different from that of the employment of the first orchestra. If it is the same that he testified the leader of the orchestra came to him and solicited the employment——

Q. (By Mr. Chavelle): Upon each occasion there was a dif- [17] ferent orchestra employed, did they come to you or did you contact the leader?

A. They came to me. .

Q. And what agreement, if any, did you enter into on each occasion that you hired the orchestra?

A. The same as the last one. All we wanted was the minimum number of members for the hall, and he was to furnish the orchestra.

Q. Is that true in all instances during the period of 1936 through 1941 inclusive?

A. Yes, that is right.

Q. Did you have the same arrangement with each orchestra leader? A. We did.

Q. Was that a verbal or a written contract?

A. Verbal contract; verbal agreement.

Q. Was the compensation fixed at the time these services were requested?

A. No compensation fixed. We just paid the regular price for the orchestra of that size.

Q. Who told you what the price of the orchestra would be? A. The leader.

Q. What agreement, if any, was there as to the discharge of the leader?

(Testimony of J. M. Hooper.)

A. We could discharge the leader on two weeks notice.

Q. Was that provision entered into at the time you entered into the arrangement with the various leaders?

A. That is what we understood was the time required for discharging an orchestra.

Mr. Winter: Time required by what?

A. As far as I know, the leader said that the time they [18] would have to have would be two weeks notice in case of a discharge.

Mr. Winter: Union rule?

A. As far as I know. I don't know whether it was or not.

Mr. Chavelle: Is that what the leader told you in each instance?

A. That is right.

Q. (By the Court): You mean that you had the right, as you understood your oral contract, to discharge the leader, but keep the orchestra?

A. No, we couldn't keep the orchestra. That would mean discharge the leader, and the orchestra would go with him. We had no right to discharge the orchestra.

Q. (By Mr. Chavelle): Did you or any of your individual members upon any occasion ever direct the orchestra as to their music that they played at these various dances?

A. Never at any time.

Q. When did Wayne Fowler's orchestra play? For what period?

(Testimony of J. M. Hooper.)

A. It was right after Arden Stevens. I can't say the exact date.

Q. Was it in 1941?

A. I don't remember.

Q. Or 1942, or when?

A. I think it was part of 1941 and part of 1942. I am not sure as to the dates.

Q. Do you recall who was playing during the first quarter of 1941, that is January or February or March? A. I don't remember. [19]

The Court: If you have that data there before you, why not refresh his memory from it? It is not a matter you need to put a great deal of time on.

Mr. Chavelle: I ask that this be marked.

(The document marked Plaintiff's Exhibit 2 for identification.)

Q. (By Mr. Chavelle): I ask you to state what Plaintiff's Exhibit 2 purports to be?

A. A check to Arden Stevens for the services of that orchestra.

Q. Do you recognize the signatures on there, signed by the Worthy President, the Secretary and the Treasurer? A. They are.

Q. And what was the date of that check?

A. June 13, 1941.

Q. Who was it made payable to?

A. Arden Stevens.

Q. For what purpose?

A. Music played on that night, the second night following this day.

(Testimony of J. M. Hooper.)

Mr. Chavelle: I ask that this be introduced in evidence.

The Court: He says "following day". He meant "preceding."

The Witness: Yes.

Mr. Winter: No objection.

Mr. Chavelle: I will offer it in evidence.

The Court: Any objection?

Mr. Winter: No objection.

The Court: It will be admitted.

(The check admitted in evidence and marked Plaintiff's Exhibit 2.) [20]

Q. (By Mr. Chavelle): Mr. Hooper, do you know whether Arden Stevens' Commodores were playing during the first quarter of 1941, this exhibit 2 being dated June 14, 1941?

A. Yes, that is about the time.

Q. Do you know whether Arden Stevens' Commodores were playing for you in January, February or March, 1941?

A. I am not sure on the date.

Mr. Winter: If you have got the checks there.

The Court: I don't think you need to take all the time to go into that. I understand there is no contention that the situation was dissimilar with the second orchestra leader than it was with the first, or the second or the third.

Mr. Winter: No. They have been hiring orchestras for 30 years in the same way, and we have affi-

(Testimony of J. M. Hooper.)
davits to that effect. Have you any other checks you want to introduce?

Mr. Chavelle: Yes, we will have them marked.

Mr. Winter: I don't think it is necessary.

(Checks marked for identification plaintiff's Exhibit 3.)

Q. (By Mr. Chavelle): Referring to Plaintiff's Exhibit marked for identification No. 3, state what that is.

Mr. Winter: We object to the introduction of the exhibit in evidence as irrelevant and immaterial.

Mr. Chavelle: You object to it, then?

Mr. Winter: Except as to its materiality.

The Court: Objection overruled. The exhibit will be admitted in evidence.

(The checks admitted in evidence and marked Plaintiff's Exhibit 3.)

The Court: I do not know that it is necessary to put [21] all these checks in, unless there is a difference in the method of paying them. If the two offered in evidence typify and represent the method of payment, in all instances, that is all that should be necessary.

Mr. Chavelle: I do not know. I will ask him.

Q. Is that true, Mr. Hooper, that the orchestra leader was paid direct in each instance during the period involved here?

A. In this same manner.

Q. He was paid personally with a check?

A. Yes.

(Testimony of J. M. Hooper.)

Mr. Chavelle: That is all.

The Court: We will take a short recess.

(Recess.)

Mr. Chavelle: I believe I have finished, Mr. Winter.

Cross Examination

By Mr. Winter:

Q. Now, Mr. Hooper, you say you are the manager of the dances that are given by the Lodge weekly? A. I was.

Q. Are you still manager?

A. Not at the present time.

Q. When did you cease to be?

A. About September last year.

Q. Of 1942? A. Yes.

Q. But during the period here involved, from 1936 to the biggest part of 1941 you were manager of the dance?

A. Manager, under the direction of the aerie and the trustees. [22]

Q. Who composed the trustees? Mr. Dodds, was he a trustee?

A. Me, Mr. White and Mr. McKnight at the present time.

Q. Those are what we call public dances?

A. Yes.

Q. For which the Lodge charges an admission price? A. Charges an admission price.

Q. And the public generally is open to attend the dances, provided they pay the admission price, plus the tax due on admissions?

(Testimony of J. M. Hooper.)

A. Yes, the public and the members, too.

Q. And when did you first become the manager of the dances? A. 1934.

Q. And Bill Winder, I think you testified, came to see you about furnishing the orchestra?

A. Furnishing his orchestra, yes.

Q. And you discussed with him what the charge for the orchestra would be?

A. I asked him how much it would be for each event, and he told me.

Q. Now, you said something, you told him you would require the minimum number for the number of musicians for the hall. Did you mean by that that the Union would require, from the hall, union members?

A. Yes. The union sets a minimum number for each hall.

Q. And they also set a minimum wage for the musicians? A. I presume they do, yes.

Q. Don't you know, as a matter of fact, that they do?

A. I never saw that, not from records; I never read any orders or laws or anything. [23]

Q. You employed a union orchestra, didn't you?

A. We employed a leader with his orchestra.

Q. It was a union orchestra? A. Yes.

Q. It would be the minimum number of musicians in that orchestra, as required? A. Yes.

Q. Where had Bill Winder been playing before that time? A. I don't know.

(Testimony of J. M. Hooper.)

Q. And you prepared this sign for him?

A. I did.

Q. In the Senator Auditorium, which is owned by Seattle Aerie No. 1? A. Yes.

Q. You often lease out the auditorium to other organizations to hold dances, do you not?

A. Yes.

Q. And the money which you made upon the dances went to the Lodge? Is that true?

A. Yes.

Q. And you did from time to time get money from it, from the holding of these dances?

A. Sometimes we lost.

Q. And, of course, the loss was assumed by the Lodge? A. That is right.

Q. How long have you been a member of this Lodge? A. Since 1917.

Q. Well, 26 years, about? A. Yes.

Q. And they have been holding dances there the last thirty—the last 26 years, up until now, haven't they? [24] A. Intermittently, yes.

Q. Do you hold any public dances other than on Saturday nights? A. No.

Q. Did you ever engage an orchestra or leader whenever you do on other nights?

A. New Years nights.

Q. New Years nights? A. Yes.

Q. And you make the same arrangement with the leader as to the orchestra at that time?

Mr. Chavelle: I object to that. It is not material what they do on New Years eve. The only

(Testimony of J. M. Hooper.)

issue here is what they do with the people involved and the orchestra involved. Naturally, what they do on New Years eve or any other time is not involved here.

The Court: He may answer.

Q. (By Mr. Winter): As there are about four New Years involved in that——

A. Your question?

Q. There are four New Years involved in that, and do you employ the same orchestra leader or the same orchestra?

A. The same orchestra.

Q. On New Years? A. Yes.

Q. And what time do you hold dances on that particular night?

A. From nine to about 2:30.

Q. Do you fix the time as to when you would open and close? [25]

A. Yes, we fix the time to open, and naturally we had to have a closing time. And so we fix it.

Q. Do you ever hold them after 2:30, when you had originally intended to hold them only until 10:30 on New Years? Do you? A. No.

Q. What time, as a rule, do you open and close on Saturday nights? A. Nine to 12:30.

Q. Is that the city ordinance in closing?

A. That is a matter of practice. They have a three and a half hour dance.

Q. How many dance numbers or dances do you have?

A. I never noticed how many they did have.

Q. They have some encores? A. Yes.

(Testimony of J. M. Hooper.)

Q. When they play for encores, then, it would be more numbers?

A. He lays out his own arrangement of music and plays it right straight through.

Q. Occasionally, when you became dissatisfied with the musicians and found the attendance falling off, you had the liberty of engaging a new orchestra, didn't you? A. At that time.

Q. And at that time you got Allen Stevens. Is that right? A. Arden Stevens.

Q. You never had a sign of Arden Stevens with "Ken Cloud" shown on it? A. Yes. [26]

Q. Is this the sign which you got for Arden Stevens?

A. That is the sign,—one of them.

Q. And then when Arden Stevens left and Ken Cloud took over, you changed it, struck out the words "Arden Stevens" and put "Ken Cloud" in there, and had it re-painted, didn't you?

A. At the direction of the leader, yes.

Q. This was your sign? A. Yes.

Q. Not compiled by the leader?

A. No, sir; we had to know the name of the orchestra.

Mr. Winter: I offer in evidence——

The Court: Under the same stipulation?

Mr. Chavelle: That is correct; the same as concerns the other sign.

Mr. Winter: We offer the sign, approximately the same sign, on which has been painted with large red letters: "Senator Ball Room" and then in black

(Testimony of J. M. Hooper.)

letters, smaller printing, "Where the Young People of Seattle Dance." "Dance" is in large black letters. And then the words "Every Saturday Night" in red letters, and then in smaller black letters, "The Music of"; and then in red letters "Ken Cloud's *Commandoes*." When you refer to the words "Ken Cloud" that is painted over the words "Arden Stevens"?

Mr. Chavelle: Do you offer that?

Mr. Winter: Yes, I offer that.

The Court: Any objections?

Mr. Chavelle: No objection, your Honor.

The Court: It will be admitted.

The sign admitted in evidence and marked Defendant's Exhibit 4. [27]

Q. (By Mr. Winter): Now, you made compensation to both the leader, or as you contend in this case, to the contractor and the musicians, as fixed by the union. Is that it?

A. I presume it is.

Q. And the leader gets an addition, is it, of 10%, in this district? A. He does.

Q. How many members of the orchestra did you have? or how many members in the orchestra, were there in September, 1940?

A. Eight, as I remember.

Q. And the eight members of the orchestra included the leader or excluded the leader?

A. With the leader.

Q. And what was the rate for each musician, exclusive of the leader?

(Testimony of J. M. Hooper.)

A. The rate changed several times.

Q. Well, will you refer to this check?

A. Well, the leader figured it out himself and gave me the price.

Q. Well, don't you know?

A. I know what it was, yes.

Q. Well, what was it?

A. That time it was,—I think it was \$9.00 per man.

Q. Nine dollars per man?

A. If I am not mistaken, eight times nine, I think.

Q. And how much was the amount of the check?

A. \$89.10. But he had a singer also.

Q. He had a singer? A. Yes. [28]

Q. Were they under the union rules also?

A. I don't know.

Q. Did you have an agreement to pay \$81.90 at that time?

A. We had an agreement to pay so much for the orchestra, and he told me how much it would be.

Q. You wouldn't know how much it would be?

A. He told me how much it would be, and I reported to the office how much it would be, so he could get his check for that amount.

Q. Now, you said the check was always made payable personally to the leader. Will you look at that check and tell the Court to whom it was made payable?

A. This one in particular is made to Arden Stevens Commodores.

(Testimony of J. M. Hooper.)

Q. What exhibit is that? A. No. 3.

Q. All right. Will you look at exhibit 2 and tell the Court to whom that check is payable?

A. Arden Stevens' Commodores.

Q. That is not payable to any one. It is payable to the whole orchestra?

A. Mr. Dowd made the checks. I didn't make them. He writes them.

Q. It is made to the whole orchestra, isn't it?

A. Made to Arden Stevens' Commodores.

Q. Do you have any other checks payable to the orchestra?

A. I don't know. All I did was hand the checks over.

Q. Do you have a cancelled check, or has your counsel any? [29]

A. I don't know. I don't think so, but I didn't make the checks.

Q. Do you have any other checks?

A. Yes, I have one made to Bill Winder. I think I have one for Ken Cloud.

Q. I hand you, Mr. Hooper, what has been marked for identification Defendant's A-1 and ask you to state what that purports to be?

A. That is one of the checks that went to Bill Winder, one of the checks given to Bill Winder.

Q. And what does it purport to be paid for?

A. Orchestra and singer.

Q. Referring to exhibit 2, what does that purport to be paid for? A. Orchestra.

Q. And exhibit 3? A. Orchestra.

(Testimony of J. M. Hooper.)

Q. What are the amounts in those respective checks, Exhibit 2? A. 89.10.

Q. And exhibit 3? A. 89.10.

Q. Now, the exhibit which has been marked for identification, that has on there "Orchestra and Singer", what is that for \$93.10.

Q. There is a difference there, then, for the singer? A. Yes.

Q. And you say the union regulation was \$9.00 per person? A. Yes. [30]

Q. Or the union rules or contract generally,—I guess it is better to put it that way—was \$9.00 in the period covered by exhibit 3?

A. It was for quite a while. They furnished their own manager, and afterwards they changed.

Q. Afterwards they started billing you for it, did they?

A. Afterwards we paid the leader for an additional member of his orchestra, as manager.

Q. Did you want to have a singer there?

A. That was up to him. It wasn't up to us.

Q. You didn't make any arrangements whatsoever for him to have a singer there? A. No.

Q. He never discussed it with you?

A. No, that was up to him if he wanted to have a singer.

Q. Could he have had a singer that cost \$100.00 there and you would have made no objection to it?

Mr. Chavelle: I object as repetition. He stated he had nothing to do with it; he said it was up to

(Testimony of J. M. Hooper.)

the leader whether there was a singer present in the orchestra.

The Court: Objection overruled.

The Witness: Will you read the question, please?

(Question read.)

A. We worked through him, yes.

Q. And you wouldn't have paid him for it, would you?

A. No, we wouldn't have paid him for it, that is true.

Q. What did you do as manager? What were your duties as manager of the dance?

A. It was up to me to see that the dances were conduct- [31] ed properly. I had police authority, and generally I was handling the public in a way that the people would want to come back again.

Q. Did the members of the Lodge or their friends who attended these dances occasionally request numbers to be played?

A. No, not to my knowledge.

Q. Did you discuss with either Mr. Ken Cloud, Mr. Stevens or Mr. Bill Winder, particularly when you put on these dances for the young people, as to whether they should play waltzes or anything of that nature?

A. No, they knew what kind of music to play. I didn't have to do that.

Q. You were the manager?

A. That is true, but the music was his business and not my business.

(Testimony of J. M. Hooper.)

Q. So you left the music up to him?

A. That is right.

Q. If he had played all waltzes you could have dispensed with his services, couldn't you?

A. Yes.

Q. If he had played all fox-trots, so that some of the members who were a little older like I am, and I went there, you could have dispensed with his services?

A. Certainly.

Q. And in that sense, if it was necessary to control what music he was going to play, you could have done it, couldn't you, by dispensing with his services?

A. Yes.

Q. And his orchestra? [32]

A. Certainly.

Mr. Winter: I think that is all.

Re-direct Examination

By Mr. Chavelle:

Q. During the period involved here, relative to the engaging of an orchestra for those dances did you at any time have any dealings with the Musicians Union as to the salary to be paid or the hours to be played?

Mr. Winter: I object to that as repetition.

The Court: Objection overruled.

A. I had no contact with the union since I have had charge of the dances. I made the contract with the orchestra leader and the orchestra leader alone.

Q. All right, Mr. Hooper. It has already been brought out—the number of dances to be played in an evening. Did you have anything to do with that?

(Testimony of J. M. Hooper.)

A. No. We just set the hours and they made their own arrangement of music to last that number of hours.

Q. And at any time, to your knowledge, was any check made payable to any individual members of the orchestra in the period involved?

A. Oh, no. I know there was no check made to any individual member of the orchestra, other than the leader himself.

Mr. Chavelle: That is all.

Re-Cross Examination

By Mr. Winter:

Q. As a matter of fact, Mr. Hooper, unless the regulations—or under the union rules the leader of the orchestra is not responsible for the wages due—or supposed to be paid to the members of the orchestra, unless it was paid by the [33] principal, being the Lodge in question here?

A. I don't know anything about the union rules.

Q. You didn't know that was the union rule?

A. No.

Q. You wouldn't say it was not the union rule?

A. I don't know.

Q. (By the Court): Did you ever discuss with any one of the members of the orchestra the matter of their employment?

A. No, sir.

Q. Or the hours they worked?

A. No, your Honor.

Q. Or the wages that they got?

A. No, your Honor, at no time.

(Testimony of J. M. Hooper.)

Q. Did you ever have to write their names, of the employees?

A. No, I didn't have, and I didn't even know their names at any time during that period.

Q. Did the rank and file of that orchestra membership change from time to time?

A. Well, it remained pretty steady. There were changes from time to time, but it remained pretty steady, the same employees.

Q. (By Mr. Winter): Ken Winder (Cloud?) played with the orchestra previous, before he left with the orchestra, didn't he? A. Yes.

Q. Then he came on as leader?

A. By agreement with Arden Stevens he took over.

Q. He replaced Ken Cloud? [34]

A. I don't know.

Q. Did they have the same number?

A. I wouldn't know who he replaced or——

Q. Did they have the same number?

A. They had the same number of men, yes.

Q. So you did replace him?

A. As far as I know; yes, they must have.

Q. Do you know whether he was a union musician? A. I don't know.

Q. It was 100% union?

A. Supposed to be, yes. I presume it was.

Q. You know, as a matter of fact, the Union would have been right after you if it hadn't been union? A. I suppose so.

(Testimony of J. M. Hooper.)

Re-Re-Direct Examination

By Mr. Chavelle:

Q. What were the circumstances under which Ken Cloud assumed leadership of the orchestra?

A. Arden Stevens was called to the service.

Q. Was that the reason?

A. That was the reason.

Witness excused.

FRANK DOWD,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Please state your full name. [35]

A. Frank Dowd.

Q. And what is your occupation, Mr. Dowd?

A. Secretary, Seattle Aerie No. 1.

Q. How long have you been secretary of Seattle Aerie No. 1?

A. Forty-one years and five months.

Q. When did you join the organization?

A. November 12, 1899.

Q. When was it founded?

A. February 6, 1898.

Q. So, for over forty years you have been secretary of Seattle Aerie No. 1?

A. Forty-one years.

Q. Forty-one years?

(Testimony of Frank Dowd.)

A. Over forty-one years.

Q. Now, during the years 1936, 1937, 1938, 1939, 1940 and 1941 did you have dances?

A. We did.

Q. And under whom were those dances?

A. Under J. M. Hooper as manager.

Q. Where were those dances held?

A. In the Eagles Auditorium or Senator Auditorium afterwards.

Q. Did you have anything to do with the engaging of the orchestra that played there?

A. Nothing whatsoever.

Q. Do you know how they were paid?

A. Paid by check.

Q. Did you draw the check?

A. I drew the checks on Fridays for the Saturdays following. [36]

Q. To whom were the checks made payable?

A. Made payable to the leader of the orchestra.

Q. Was the entire matter left up to Mr. Hooper as to engaging these orchestras?

A. He was the one that was authorized by Seattle Aerie No. 1.

Q. To engage this orchestra. A. He was.

Q. Referring to plaintiff's exhibit 2, would you state what that is?

A. That is the first check issued to Arden Stevens, to his dance orchestra.

Q. Who made that check out? A. I did.

Q. Is that your handwriting? A. Yes, sir.

Q. Was it signed by you? A. Yes, sir.

(Testimony of Frank Dowd.)

Q. And by whom else?

A. By Martin Robbins, Worthy President, and J. M. Davis, Treasurer.

Q. Is that the customary method that was used to pay the orchestra during 1936, 1937, 1938, 1939, 1940 and part of 1941? A. Always.

Q. Did you ever make any checks payable to any of the individual members of the orchestra?

A. None whatever.

Q. How did you determine these amounts that were inserted in these checks? How were those amounts determined? [37]

A. They were furnished by the leader or by the manager of the dance for that night.

Q. And who was that? A. J. M. Hooper.

Q. Are you still having dances in Seattle Aerie No. 1? A. We are.

Q. Was Mr. Hooper authorized by Seattle Aerie No. 1 at that time to conduct these dances and arrange for these dances? A. Yes, sir.

Q. Is it a fact or not that he had nothing to do with the orchestra, except to pay the leader?

Mr. Winter: We object to it. He is just leading the witness.

The Court: I think that question is leading.

Q. (By Mr. Chavelle) What, if anything, did you have to do with the orchestra?

A. Nothing.

Mr. Chavelle: That is all.

(Testimony of Frank Dowd.)

Cross Examinaton

By Mr. Winter:

Q. Mr. Dowd, in connection with the filing of your claim for refund, you made an affidavit and filed it with the Treasury Department, didn't you?

A. Yes, sir.

Q. I show you what has been marked for identification Government's Exhibit A-2 and ask you whether that is your signature appearing thereon, to the affidavit which you referred to?

A. It is my signature on that.

Q. Will you read it? [38]

(Witness reads paper.)

A. I have read enough of it to know what it is all about.

Q. That is your affidavit?

A. That is my affidavit, yes.

Mr. Winter: We will offer in evidence Defendant's Exhibit A-2.

The Witness: I would like to qualify. It is customary——

Mr. Winter: Just a minute!

Mr. Chavelle: Just one question.

Q. (By Mr. Chavelle): Did Seattle Aerie No. 1 authorize you to make that affidavit?

A. The question came up and I took it before the treasurer and the treasurer told me to go ahead and answer it as best I could.

The Court: I haven't seen it, but I will admit it in evidence anyway.

Mr. Winter: We offer it in evidence anyway.

(Testimony of Frank Dowd.)

Mr. Chavelle: I object as immaterial and not authorized.

The Court: It will be admitted.

(The affidavit admitted in evidence and marked Defendant's Exhibit A-2.)

Q. (By Mr. Winter): Did Seattle Aerie No. 1 authorize you to make a claim for refund?

A. Yes, sir.

Q. They also authorized you to do anything necessary to get that refund, then, didn't they?

A. Yes, sir.

Q. And you thought this was necessary in order to get the refund through?

A. No. That was the custom we had had in the past. We [39] had been running dances for thirty years, on that basis. This was definitely generally arranged with the dance manager.

Q. You just gave it to the dance manager?

A. I gave it the customary way here in the past.

Q. Now, you arranged for a dance master or dance manager?

A. No, we had a dance manager all of that time.

Mr. Chavelle: No use browbeating the witness. Ask him questions one at a time.

Mr. Winter: That will be all.

Re-direct Examination

By Mr. Chavelle:

Q. Mr. Dowd, referring to the affidavit, what is the fact as to whether you are acquainted with the

(Testimony of Frank Dowd.)

operation of the dances, or the functions of the orchestra and the procedure in 1936, 1937, 1938, 1939, 1940 and the first quarter of 1941?

A. Yes.

Q. You were? A. Yes, sir.

Q. And in the affidavit, is that the way it was set up or was that prior to the time?

A. That is prior to the time.

Mr. Winter: I object to counsel leading the witness.

Mr. Chavelle: I asked him whether it was prior or not.

A. It was prior to that time.

Q. (By Mr. Winter): You sought to file and filed an affidavit in the claim for refund?

Mr. Chavelle: Now——

Mr. Winter: What has that to do——

Mr. Chavelle: Now, this has nothing to do with the claim for refund. I filed the claim for refund.

[40]

Mr. Chavelle: Any objection to that going in evidence?

Mr. Winter: None, except it is unnecessary. We stipulated that you filed a claim for a refund.

The Court: It will be admitted in evidence.

(The affidavit admitted in evidence and marked Plaintiff's Exhibit 5.)

(Witness excused.)

Mr. Chavelle: The plaintiff rests, on this Seattle No. 1 Aerie case.

Mr. Winter: We have no evidence. We rest.

The Court: Do you have others of these five cases that are similar in nature, except as to the amounts, to the Seattle case?

Mr. Winter: One more.

The Court: Which one is that?

Mr. Chavelle: The Ballard case. I think it was stipulated before we came to court that Tacoma and Olympia may be passed for the reason we filed these three cases we are trying here, which will determine all the issues involved in those cases?

The Court: Tacoma and Olympia?

Mr. Chavelle: Yes. They raise the same issues as the Aberdeen.

Mr. Winter: We think they raise the same issues.

The Court: Well, does that conclude the evidence you want to offer for the consideration of the Court and the record?

Mr. Winter: One more case.

Mr. Chavelle: The Ballard case. [42]

The Court: Does it turn upon the question of independent contractor?

Mr. Chavelle: Yes, the same question.

Mr. Winter: It involves, in addition, the fact, —That is as to the conflict of the testimony with respect to the members employed in that, whose status is in question.

The Court: Well, it is too late to begin that, so I believe we will adjourn and reconvene at 9:45 in the morning. Can you get here from Seattle at that time?

Mr. Chavelle: Yes, your Honor.

The Court: That will be satisfactory.

(Whereupon an adjournment was taken until May 26, 1943, at which time the trial resumed, as to Case No. 510.)

Mr. Winter: I would like to file with the Court the schedule we agreed upon and the names of the employees and the amount of the payment.

FRED THORLACKSON,

A witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Will you state your name, please?

A. Fred Thorlackson.

Q. What is your occupation?

A. Secretary of the Ballard Eagles.

Q. How long have you been secretary of the Ballard Eagles?

A. Approximately five years, with an absence of five months. [43]

Q. Did you during the year 1936 have a musician who rendered services for you?

A. That was before I took office.

Q. Were you a member of the Ballard Eagles at that time?

A. Yes, there was a musician there.

Q. Will you explain briefly how the musician becomes a part of the organization?

(Testimony of Fred Thorlackson.)

A. How he becomes a part of it?

Q. Yes.

A. He is appointed by the Worthy President.

Q. And would you outline briefly his duties?

Mr. Winter: If he knows. Or, is it provided in the constitution? If his duties are provided for in the constitution, I believe that would be the best evidence.

Mr. Chavelle: No, there is nothing in the constitution about it. Go ahead.

Q. (By Mr. Winter): Do you know?

A. Yes.

Q. (By Mr. Chavelle): What are the duties of the musician?

A. He plays for the opening ceremonies, during the initiation, and the closing of the meeting in ritualistic work.

Q. Plays the piano? A. That is right.

Q. What compensation does he receive per year?

A. I don't know what he received at that time.

Q. What does he receive generally now?

A. \$2.50 per meeting.

Q. During the year 1936 did you employ any physician in the Ballard Aerie?

A. Yes, I believe there were. [44]

Q. How are they selected under the constitution? The same way they are in these other aeries?

A. That is right.

Q. Who were your physicians in 1936, 1937, 1938 and 1939?

A. I believe there was a change there.

(Testimony of Fred Thorlackson.)

Mr. Winter: If the Court please, the schedule which we stipulated has that set forth therein, Dr. Megard and Dr. Norgard.

Q. (By Mr. Chavelle): Doctor Megard and Dr. Norgard in 1936?

A. I believe that is right.

Q. Did Dr. Megard have his office in Ballard?

A. Yes.

Q. And was Dr. Norgard's office in Ballard?

A. It was.

Q. Did they perform their duties under the constitution in your aerie? A. That is right.

Q. Did you have any privilege of controlling the doctors at the time? A. No.

Q. In no way?

Mr. Winter: That is repetition.

The Court: It is not in this case, but it might be stipulated that the physicians, in reference to this Ballard Aerie are the same as they are in the Aberdeen Aerie.

Mr. Winter: It may be so stipulated.

Mr. Chavelle: Yes, that is agreeable.

Q. In 1937 what did you pay your musician, do you recall? [45]

A. I believe it was \$2.00 per meeting.

Q. And was the compensation of the trustees fixed by the constitution? A. No.

Q. What did you pay your trustees during the years 1936, 1937, 1938 and 1939?

A. I believe if I am correct there wasn't any change, \$12.00 per year.

(Testimony of Fred Thorlackson.)

Q. In 1938 can you tell me what physicians you had? A. I believe the same.

Q. In 1938 what position did Paul Fisher have?

A. He was Worthy President.

Q. Henry Voss and H. King.

A. I believe trustee.

Q. And E. Swartout? A. Musician.

Q. E. C. Collier? A. Junior or Senior?

Q. Senior. A. Was that 1938?

Q. 1938.

A. He was treasurer for part of that time.

Q. And Dr. Megard and Dr. Eggers, were they your two Aerie Physicians during that year?

A. Dr. Megard was for the entire year and Dr. Eggers was for a part of the year.

Q. Arthur Rosenfield? E. Sanger? Who are they? A. They were trustees.

Q. At that time? A. Yes. [46]

Q. C. A. Sundberg, what was his position in 1938?

A. He had no position, not C. A.

Q. Do you remember the auditing committee during that period, then?

A. Yes. He probably was on the auditing then.

Q. Is the auditing committee's compensation fixed by the constitution? A. No, it is not.

Q. Do you know what they are paid, if anything?

Mr. Winter: I object to it as incompetent, irrelevant and immaterial.

(Testimony of Fred Thorlackson.)

The Court: The objection will be overruled.

A. I don't remember just exactly what the compensation was, Mr. Chavelle.

Q. (By Mr. Chavelle): What is it now? Do you know what it was in 1939? Was it a non-compensation job?

A. That is at the jurisdiction of the Aerie, of the members.

Q. What has your aerie done? What position did your aerie take with reference to the auditing committee, so far as compensation was concerned?

A. We pay them now.

Q. What do they receive?

A. I think it is \$1.00 per month.

Q. Now, there was an E. C. Steele in 1938. What was his position?

A. Treasurer for a part of the term.

Q. And E. Trambley, what was his position?

Mr. Winter: Do you mean now?

Mr. Chavelle: In 1938. [47]

A. At that time he was probably Inside Guard. I am not certain.

Q. What are the duties of an inside guard?

A. The Inside Guard's duties are partly ritualistic, in the governing of the door, the entrance to the Lodge hall.

Q. And when does he appear on his job?

A. Just before the opening of the meeting.

Q. How often do you meet at the Ballard Aerie No. 172? A. Each Tuesday evening.

(Testimony of Fred Thorlackson.)

Q. Now, there is an Earl Dreshel. What was his position during 1938?

A. He was one of our stewards.

Q. That meant he worked in the club room?

A. Yes.

Q. Earl Anderson?

A. Worked in the club room.

Q. James E. Anderson?

A. Worked in the club room.

Q. Steven R. Renbrill? A. Janitor.

Q. Jack Smith?

Mr. Winter: All the rest of them work in the social room?

Mr. Chavelle: I am not sure of that.

A. Jack Smith I believe worked in the club room.

Q. And J. Cosgrove,—John Cosgrove.

A. I don't know exactly what his duties were at that time, whether he was in the club room or not.

Q. Do you pay your physician, under the constitution, 50 cents per member?

A. That is correct. [48]

Q. Per quarter? A. Yes.

Mr. Chavelle: I believe it is stipulated as to what the Aerie Physician received in 1936?

Mr. Winter: Yes, the sheet which we have filed shows the wages paid, the amount paid, to each of the individuals involved in the statement, if the Court please.

The Court: For a period of how long a time?

(Testimony of Fred Thorlackson.)

Mr. Winter: For 1936, 1937, 1938 and 1939.

The Court: That is paid throughout the whole year.

Mr. Chavelle: Yes, that represents the entire year. Your Honor will notice the names of the other individuals which are not possibly in the social department. Under the complaint or claim for refund the amounts are not put in there for the obvious reason it becomes immaterial. Your Honor will notice here for instance, 1937, after the word "Treasurer, \$8.00" we have put a note at the end of the exhibit. This amount was paid to this individual, which was claimed in the claim, in the complaint, but not in the claim for refund, which becomes a matter of argument, of law, as to whether or not the plaintiff can recover with respect to their enumerations, when they have mentioned it in their claim for refund.

Does your Honor understand what I am getting at?

The Court: Yes, I do. I don't understand how you enumerate three who had no compensation.

Mr. Winter: None was paid to them. That is the amount paid to the three, all of them.

The Court: It would follow logically there would be no claim for refund. [49]

Mr. Winter: But the question might arise whether they had eight or more.

The Court: As to whether they would be employees?

Found

(Testimony of Fred Thorlackson.)

Mr. Winter: That is right. But you could not, —we contend the Court may consider them because they were not on the claim for refund as not having been included and employed.

Q. (By Mr. Chavelle): Do you pay a Federal income tax, Ballard Aerie No. 172?

A. We do not.

Q. Did you pay a Federal Income tax for the years 1936, 1937, 1938 and 1939?

A. We did not.

Q. I will ask you if the ritualistic officers referred to here are generally engaged in a regular and steady occupation?

A. They have work as far as to my knowledge.

Mr. Chavelle: I believe that is all.

Mr. Winter: I have no questions.

Q. (By the Court): How many of these, in these years 1936, 1937, 1938 and 1939, which this list names, were ritualistic officers as distinguished from employees?

Mr. Chavelle: I beg your pardon?

The Court: I would like to get some information as to how many of these were ritualistic officers in those years.

Mr. Chavelle: They are not.

The Court: But their positions are not indicated on here.

Mr. Chavelle: In this 1938 it is.

The Court: Take 1936.

Mr. Chavelle: Are you referring to that? [50]

(Testimony of Fred Thorlackson.)

The Court: They are indicated in 1937. They are indicated there, but when you get to 1938——

Mr. Chavelle: I don't remember that.

Mr. Winter: I want to point out that all of these individuals filed except the ten are admitted employees, except those which have been recited in the claim for refund.

Mr. Chavelle: May we clear that?

Q. (By Mr. Chavelle): Paul French, during the year 1938, what position did he occupy in Ballard Aerie No. 172?

A. 1938, Worthy President.

Q. H. Foss, what position did he occupy?

A. Treasurer.

Q. Their compensation was fixed by the constitution?
A. That is correct.

Q. Do you know whether Paul Fisher received any compensation in 1938?
A. I do not.

Q. Do you know whether Henry Voss received any compensation in 1938?
A. I don't recall.

Q. And E. C. Collier, what was his position in 1938?
A. Treasurer.

The Court: I thought you said Foss was treasurer.

The Witness: Well, may I clarify that?

Mr. Chavelle: Yes, explain it.

A. Your Honor, during the year of 1938—Our year begins June 1,—I think E. C. Collier went out prior to June 1 and—No, Voss was a trustee, was he not? Excuse me. At that time I was a trustee and E. C. Collier was treasurer.

(Testimony of Fred Thorlackson.)

Q. T. J. Helser? A. Secretary. [51]

Q. T. T. Gullickson? A. Secretary.

Q. E. Sater? A. Musician.

Q. What compensation did he receive in 1938?

A. Two dollars each meeting.

Q. You met once a week? A. Yes.

Q. E. C. Megard? A. Physician.

Q. R. Wggers? A. Physician.

Q. O. Rovenow? A. Trustee.

Q. What compensation did the trustee receive?

A. I don't recall that he received any, whether they took any.

Q. Is it provided for in the constitution?

A. I believe it was a compensation of \$12.00 a year.

Q. E. Sigler?

Mr. Winter: We have stipulated that the record shows.

Mr. Chavelle: It doesn't show on the schedule who they are.

The Court: The Court has asked for it.

Mr. Winter: We will stipulate that they were paid, though. I think that is a fact.

Q. E. Sigler? A. For 1938?

Q. Yes, 1938. A. Trustee. [52]

Q. Henry Frederick? A. Trustee.

Q. Earl Dresher?

A. Club Room employee.

Q. W. O. Peterson?

A. Club Room Employee.

(Testimony of Fred Thorlackson.)

Q. Carl Anderson?

A. Club Room Employee.

Q. P. E. Anderson?

A. Club Room employee.

Q. S. Rennick? A. Janitor.

Q. C. A. Winder?

A. Auditing Committee.

Q. What was his compensation?

A. I don't recall.

Q. Fixed by the constitution? Or is it up to the individual aerie? A. Up to the aerie.

Q. Jack Smith? A. Club Room employee.

Q. E. R. Steel? A. Treasurer.

Q. J. Cosgrove?

A. I think he was in the social room at that time.

Q. P. McIntire?

A. Club Room employee.

Q. Paul Fisher? A. Worthy President.

Q. E. E. Trombley? [53]

A. Inside Guard.

Q. Or Outside Guard?

A. Outside Guard, I meant.

The Court: Well, did you just have one member of that auditing committee? Or did you have a committee?

A. No. At that time I believe there was just one member, your Honor.

Q. As to the Outside Guard, he was a ritualistic officer? A. Yes.

(Testimony of Fred Thorlackson.)

Q. Now, did Paul Fisher occupy two positions?

A. No, he was the Worthy President.

The Court: He appears twice on this list for 1938.

Q. (By Mr. Chavelle): Was he president in 1937?

A. I believe he was. He took over the term of the previous president, who had not finished his term.

Q. That is the reason for the duplication?

A. I believe so, yes.

Q. So he served part of 1937 and all of 1938 as President?

A. That is correct.

Q. When does he take office?

A. June first.

Q. June first of each year?

A. Yes.

Mr. Chavelle: Does that answer your Honor's question?

The Court: Well, in part. He should be counted in that tabulation for two instead of one. As he explained something there, it will be held as a matter of law that they were employees. He is on there twice.

Q. (By Mr. Chavelle): Explain why he was on there twice. [54]

Mr. Winter: We can explain it.

The Court: Why was it?

Mr. Winter: Because he was paid out of the social fund. We have witnesses who examined their books. He was paid substantially out of the

(Testimony of Fred Thorlackson.)

social fund as an employee during a part of the year. Don't you recall that?

The Court: Paid out of the social fund?

Mr. Winter: Yes.

The Witness: Well, in order to clarify that, I might say that was the first year I was the secretary, and we have three funds and there was nobody there to teach me all the rules and regulations of the books, which are strenuous themselves, and I paid different checks out of different funds, which were not supposed to have been paid, so far as the regulations are concerned.

Q. (By Mr. Chavelle): Isn't it a fact that Paul Fisher's only occupation was physician during 1938?

Mr. Winter: Did you finish?

A. Yes. As far as I know that is absolutely correct.

Q. (By Mr. Chavelle): How much did you pay him out of each fund? How much compensation was he supposed to get?

A. Four dollars per year.

Q. (By Mr. Winter): The social fund is the amount kept for the bar-room and the other social activities? A. Generally speaking, yes.

Q. Cigar fund, and everything you sold there in the club? A. That is right.

Q. You have all of these employed in the social room? A. Yes.

Mr. Chavelle: That is all.

Witness excused. [55]

E. R. STEELE,

a witness on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Chavelle:

Q. Will you please state your name?

A. E. R. Steele.

Q. Where do you reside?

A. 1521 West 60th, Seattle, Washington.

Q. Are you a member of the Seattle Aerie?

A. I am.

Q. Are you a member of Ballard Aerie No. 172?

A. Yes.

Q. How long have you been a member of Ballard Aerie No. 172?

A. Practically ten years.

Q. During the year 1938 did you hold any official position in Ballard Aerie 172?

A. Starting in June, yes, I was elected treasurer.

Q. In 1939 did you hold any position?

A. Treasurer.

Q. In 1938 do you recall what compensation you received from Ballard Aerie, if any?

A. The amount of \$1.00 a month.

Q. The amount of \$1.00 a month?

A. Yes.

Q. In 1939 you testified you were treasurer. What compensation did you receive?

A. I believe it was still \$1.00 a month.

Q. Where did you perform your duties as treasurer? [56]

(Testimony of E. R. Steele.)

A. At home sometimes, and also I have certain duties that have to be performed at the lodge hall, but a certain amount of my work I can do at my home.

Q. Are you regularly employed?

A. Yes, I am.

Q. How much time do you devote to the job?

A. In my regular employment?

Q. No. I meant the regular employee as an officer of the aerie. Is that your only job?

A. No, sir.

Q. How much time do you devote to the duties of treasurer?

A. Oh, I would say,—I would imagine it would involve perhaps only a total of about six hours during a month I would imagine.

Q. Are there any duties that you perform in connection with the job of treasurer that you perform in the aerie room proper?

A. Only to the extent that I keep a monthly report as to the financial standing of the lodge.

Q. Do you wear any regalia, or classification as such?

A. Yes, I have a part of the regalia of the officers of the Lodge.

Q. Do you have a chair which you occupy during meetings? A. I do.

Mr. Chavelle: I believe that is all.

(Testimony of E. R. Steele.)

Cross Examination

By Mr. Winter:

Q. I take it, Mr. Steele, that you perform all the duties required under the constitution of the aerie? Is that right? [57]

A. That is right.

Q. And they are prescribed in the constitution, what you are supposed to do?

A. That is right.

Q. And you are elected to the office in June of each year?

A. Yes, sir.

Q. And you are still an officer?

A. Yes.

Q. (By the Court): What is your occupation?

A. Pipe man for the city of Seattle Water Department.

Q. And you have been engaged in that occupation about how long?

A. About ten years.

Q. Are you on civil service status with the city?

A. Yes, sir.

The Court: That is all.

Witness excused.

Mr. Chavelle: We would like to have these claims for refund marked for identification. These are offered, claims for refund in the Ballard 171 case. If there is no objection by counsel for the Government I will introduce them in evidence.

Mr. Winter: No objection.

The Court: They will be admitted.

The claims for refund admitted in evidence and marked Plaintiff's exhibit 1, 2, 3 and 4.

Mr. Chavelle: That is our case. [58]

The Court: Do you have any more witnesses?

Mr. Winter: May I ask whether the stipulation was received in evidence with respect to this Ballard case?

(No response from any one.)

Mr. Winter: That will be all, I think, your Honor.

Whereupon the case was argued at length by the respective counsel.

Case closed.

[Endorsed]: Filed Jan. 29, 1944. [59]

[Endorsed]: No. 10686. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Aberdeen Aerie No. 24 of the Fraternal Order of Eagles, a corporation, Appellee, and United States of America, Appellant, vs. Ballard Aerie No. 172 of the Fraternal Order of Eagles, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed February 17, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10686

UNITED STATES OF AMERICA,
Appellant,
vs.

ABERDEEN AERIE No. 24 of the FRATERNAL
ORDER OF EAGLES,
Appellee.

STATEMENT OF POINTS TO BE
RELIED UPON

Now Comes the United States of America, appellant in the above-entitled cause, and files the following statement of points to be relied upon in the prosecution of this appeal in the above-named case from the judgment of the District Court of the United States for the Western District of Washington entered on September 14, 1943.

1.

The appellee had in its employment the following individuals as employees for purposes of Title VIII of the Social Security Act and Sub-chapter A of Chapter 9 of the Internal Revenue Code during the periods indicated:

Physician	1938 through Sept. 30, 1941
President	1938 and 1939
Vice President	1938
Treasurer	1938 and 1939

Trustees 1938 through 1939

2.

The individuals named in paragraph 1 for the periods and purposes there stated were not excluded from the employment of appellee on the ground that they were officers whose duties and activities were exclusively ritualistic.

3.

The physician named in paragraph 1 for the period and purposes there stated was not excluded from the employment of appellee on the ground that the physician was an independent contractor.

Wherefore, appellant prays that said judgment may be reversed and that such other and further relief may be granted as to this Court may seem just and proper.

J. CHAS. DENNIS

United States Attorney.

HARRY SAGER

Assistant United States Attorney.

THOMAS R. WINTER

Special Assistant to the Chief
Counsel, Bureau of Internal
Revenue.

Copy received this 17th day of January, 1944.

CORNELIUS C. CHAVELLE

Attorney for Appellee

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 17, 1944. Judson W. Shorett, Clerk. By ER, Deputy.

[Endorsed]: Filed Feb. 17, 1944. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10686

UNITED STATES OF AMERICA,

Appellant,

vs.

BALLARD AERIE No. 172 of the FRATERNAL
ORDER OF EAGLES,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON

Now Comes the United States of America, appellant in the above-entitled cause, and files the following statement of points to be relied upon in the prosecution of this appeal in the above-named case from the judgment of the District Court of the United States for the Western District of Washington entered on September 14, 1943.

1.

In addition to five others whose status is conceded to be that of employees for purposes of Title IX of the Social Security Act, the appellee had in its employment the following individuals as employees for purposes of Title IX of the Social Security Act during the periods indicated:

	1936	1937	1938	1939
Physicians	2	3	2	2
Treasurer	1	—	1	1
Musician	1	1	1	1
	—	—	—	—
Total	4	4	4	4

2.

The individuals named in paragraph 1 for the periods and purposes there stated were not excluded from the employment of appellee on the ground that they were officers whose duties and activities were exclusively ritualistic.

3.

The physicians named in paragraph 1 for the period and purposes there stated were not excluded from the employment of appellee on the ground that they were independent contractors.

Wherefore, appellant prays that said judgment may be reversed and that such other and further

relief may be granted as to this Court may seem just and proper.

J. CHAS. DENNIS

United States Attorney.

HARRY SAGER

Assistant United States Attorney.

THOMAS R. WINTER

Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

Copy received this 17th day of January, 1944.

CORNELIUS C. CHAVELLE

Attorney for Appellee

[Endorsed]: Filed in the United States District Court. Western District of Washington, Southern Division. Jan. 17, 1944. Judson W. Shorett, Clerk. By ER, Deputy.

[Endorsed]: Filed Feb. 17, 1944. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10686

UNITED STATES OF AMERICA,

Appellant,

vs.

ABERDEEN AERIE No. 24 of the FRATERNAL
ORDER OF EAGLES, a corporation,

Appellee.

No. 10686

UNITED STATES OF AMERICA,

Appellant,

vs.

BALLARD AERIE No. 172 of the FRATERNAL
ORDER OF EAGLES, a corporation,

Appellee.

STIPULATION FOR DESIGNATION
OF RECORD FOR PRINTING

The above-entitled causes having been consolidated for trial in the lower District Court and the appellant and appellees having, through their respective attorneys, stipulated that the records in the above-entitled causes be consolidated on appeal for the purpose of the record, argument, briefing, opinion and judgment, now, hereby, stipulate and designate the entire transcript of the record, as prepared and

certified by the Clerk of the United States District Court for the Western District of Washington, as necessary for the consideration of these appeals and the whole thereof be printed, except all exhibits certified in their original form and particularly Exhibit 6 in District Court Cause No. 459, being the Constitution for Subordinate Aeries, Fraternal Order of Eagles, be not printed, the right being reserved to either of the parties and the court to refer to them for all purposes as though they did appear in the printed record.

Dated this 24th day of Jan., 1944.

J. CHAS. DENNIS

United States Attorney.

HARRY SAGER

Assistant United States At-
torney .

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Special Assistant to the Chief
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Revenue.

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CORNELIUS C. CHAVELLE

Attorney for the Appellees.

[Endorsed]: Filed Feb. 17, 1944. Paul. P.
O'Brien, Clerk.

